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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CARLOS RUIZ, JR., Defendant and Appellant.	F060752 (Kern Sup. Ct. No. BF127496B) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Joseph C. Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Robert Gezi, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Carlos Ruiz, Jr. (defendant) was charged and convicted of several felonies based on his participation in the armed robbery of patrons at a

barbershop: count V, carjacking (Pen. Code,[1] § 215); counts VI, VII, VIII, and IX, robbery (§ 212.5, subd. (c)); and count XI, the substantive gang offense of street terrorism (§ 186.22, subd. (a)).[2]

As to counts V through IX, the jury found the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)); and that a principal personally used a firearm in the commission of the offenses (§ 12022.53, subd. (b)) & (e)). Defendant was sentenced to 13 years plus 15 years to life.

On appeal, defendant contends his right to a speedy trial was violated during the complicated pretrial procedural history of the case. He also contends the court should have bifurcated the evidence on the gang issues from the other substantive charges. Defendant raises several challenges to his conviction in count XI, the substantive gang offense, and the jury's findings on the gang enhancements. Defendant also raises several instructional issues.

We will correct the calculation of defendant's presentence credits and otherwise affirm.

FACTS

Defendant and Harris get a ride

Ashli Winters and Patrick Harris were close friends. Winters testified that on March 4, 2009, sometime between 2:30 p.m. and 2:36 p.m., Winters dropped off Harris and defendant, who was his friend, in the area of Wilkins Street, near Kincaid and South

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

[2] As we will explain in issue I, *post*, defendant was initially charged in a consolidated information that alleged additional counts against multiple codefendants for an unrelated home invasion/murder committed by members of the East Side Crips. The prosecution eventually elected to sever the two cases, and defendant was tried by himself on the offenses he committed during the barbershop robberies and carjacking.

Kings Streets in Bakersfield.[3] This location was a few blocks from Key Barber Shop. Defendant and Harris got out of Winters's car together. They were both wearing black clothes. Defendant wore a black "hoodie." Harris wore a black sweater or zipped-up sweatshirt with a hood. After Winters dropped them off, she drove away from the area and went to a friend's house.

Key Barber Shop

Also on March 4, 2009, Robert Key was working at Key Barber Shop located on East Brundage Lane in Bakersfield. Key had owned and operated his barbershop since 1965, and he had never been robbed. He described his shop as a neighborhood place where people often gathered to visit.

Around 2:30 p.m., Key was cutting the hair of Mackinley Mosley, an investigator for the district attorney's office. Mosley was armed with his service weapon, a .40-caliber Glock handgun, which was in a waistband holster. Mosley had driven his county-issued white Dodge Charger to the barbershop, and parked it behind the business.

There were two other people in the barbershop: Joe McClary, Key's brother-in-law, and Aaron Williams, a retired sergeant from the Los Angeles County Sheriff's Department. Williams still carried law enforcement identification.

The barbershop robberies

As Robert Key cut Mosley's hair, two masked men abruptly entered the barbershop. One man held up a gun, said it was a " 'robbery' " or a " 'stick up,' " and ordered everyone to get on the floor. One man was taller than the other. The taller man displayed the gun and gave the orders. He was dressed in grey and black with a hood that covered his head and part of his face. He also wore a mask which covered his face from the eyes down. The shorter man wore a hooded sweatshirt and was completely cloaked

[3] Winters testified at both the preliminary hearing and trial under a grant of immunity.

in dark clothing with a ski mask over his face, but his eyes were visible. Williams testified the men seemed to be wearing oversized clothing to disguise their appearances.

Key and his three customers did not immediately react because they did not realize what was going on. The taller man pointed the gun at Williams and Mosley, and again told everyone to get down. The taller man grabbed McClary and pushed him to the floor. Williams hesitated and the smaller man repeatedly ordered him to get down. McClary urged Williams to get down. Williams and the other men finally complied.

The taller man ordered everyone to throw their wallets on the floor. One of the suspects picked up the wallets from the floor. Key testified that one of the masked men took $40 or $50 from his cash box. The taller man reached into Key's pocket and took his wallet.

As Mosley got out of the barber chair and onto the floor, the smaller suspect realized Mosley was armed with a weapon and said, " 'Oh, he's got a gun, too.' " The smaller man removed Mosley's service weapon from his waistband. The smaller man thought he was taking Mosley's wallet, but he actually took Mosley's black "flat badge" identification. He told Mosley to remove his jewelry and Mosley complied.

The taller man noticed that McClary was also wearing jewelry and told him to take off the pieces. McClary removed his Movado single-diamond, blackface watch; a gold-nugget/diamond ring; and a gold chain bracelet. McClary had trouble removing a diamond pinky ring from his finger. The taller man pointed his gun at McClary, repeatedly told him not to move, and threatened to "pop" him if he did not hurry and take off the ring. The taller man held the gun at the back of McClary's head and searched his back pocket. McClary was finally able to remove the ring. He placed the jewelry on the floor, and the taller man picked up the pieces.

McClary described the gunman's weapon as a black or dark grey semiautomatic handgun. McClary testified the taller man had a loose bullet in his hand. He dropped it on the floor, by McClary's face, and then picked it up.

The smaller man removed Williams's wallet from his rear pants pocket and took Williams's gold/diamond ring.

The Dodge Charger

After the two suspects had taken money and jewelry from the victims, the taller man yelled out and asked who was driving the Dodge Charger. Mosley responded that the car belonged to him. The taller man said, " 'Give me the keys.' " Mosley threw his keys on the floor. One of the suspects retrieved the keys.

McClary testified that as the two suspects left the barbershop, the taller man said, " 'If anyone stick[s] their head out of the door, we're going to come back and kill everybody.' " The two suspects walked out, and McClary heard a car start and quickly accelerate away from the area.

Defendant and Harris arrive at the apartment

Terrance Ellis's godmother lived in an apartment on Feliz Drive in Bakersfield.[4] Ellis testified that defendant used to visit the apartment and play dominoes with him. Ellis, who was 16 years old, knew defendant as "A-Loc" or "Baby A-Loc." Ellis knew Patrick Harris as "No Sense." Ellis testified that both defendant and Harris ran with the East Side Crips (ESC).

Ellis testified that defendant and Harris arrived at his godmother's apartment on a particular afternoon.[5] Defendant and Harris had a bag and some wallets. They told Ellis to get rid of the bag. Ellis refused because he did not want to touch the bag. One of the men had a gun under his shirt. At trial, Ellis could not recall which man was armed, but

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[4] At trial, various witnesses pronounced this area as either "Felix" or "Feliz" Street or Drive. According to the People, the correct identification is Feliz Drive.

[5] Ellis identified defendant and Harris through separate photographic lineups. He also explained that Harris had a very distinctive tattoo of a dollar sign or something similar over both eyes.

he previously stated that defendant had the gun. Defendant and Harris changed clothes and took off their black shirts.

Ellis testified that Harris made a telephone call from the apartment and asked someone for a ride. After defendant and Harris had been at the apartment for about 10 minutes, they left and were picked up in a vehicle.

Winters picks up defendant and Harris

Ashli Winters testified that later in the afternoon, after she had dropped off defendant and Harris, Harris called her and again asked for a ride. Winters drove to Feliz Drive and picked up both defendant and Harris. Harris told her to drive them to a location on Miller Street.

During the drive, Harris produced a sandwich bag from his pants pocket. The bag was full of jewelry, including a gold or silver watch with a black face, a gold "nugget" ring, and a ring resembling a flower.

Winters testified that defendant and Harris discussed the jewelry, and defendant said something like, "[W]e can't take it to a pawn shop, 'cause they're gonna notice it." (RT 348) Defendant also said, "That was a cop." Winters did not know what defendant meant.

When Winters arrived at the Miller Street location, defendant and Harris got out of her car and then got into another vehicle. Winters could not see who was in the other car. Winters noticed that Harris was not wearing his black sweatshirt from earlier in the day.[6]

[6] At trial, Winters extensively testified about why she cooperated with the police. Winters heard on television that she was considered a suspect in the barbershop robbery. Winters went to the police to clear her name. Winters conceded that she initially told the police that she never saw Harris. Winters testified she eventually decided to fully cooperate after the police threatened to take her child away.

The initial dispatch

In the meantime, Mosley called 911 immediately after the two robbery suspects left the barbershop. At approximately 2:37 p.m., the Bakersfield Police Department sent out the first dispatch about the armed robbery, that the suspects fled the scene in a white Dodge Charger, and they had taken a firearm.

At 2:51 p.m., a police officer found Mosley's stolen Dodge Charger near the 800 block of McNew Court. It was parked at the very end of an apartment complex's parking lot. No one was in or around the vehicle. The stolen car was found about one-half mile from the barbershop. It would have taken about one or two minutes for someone to drive there from the barbershop. A black knit cap was under the driver's seat.

At 2:53 p.m., Detectives Dossey and Moore received the dispatch about the discovery of the stolen car. The detectives drove to that location and received information that two suspects had run northbound from McNew Court to the next street, which was Feliz Drive. There was an open walkway that led directly from McNew Court to Feliz Drive.

At 3:30 p.m., the detectives contacted Victoria Campbell, who was sitting in a car parked on Feliz Drive, and asked if she had seen anyone running in the area. Campbell said that she had seen two black males running " 'through here.' " Campbell gestured toward the sidewalk between McNew Court and Feliz Drive. Campbell thought the men looked like black adults and believed they were wearing hooded sweaters. Campbell said the two suspects ran in the direction of the apartment building located at 900 Feliz Drive, directly across the street from her residence. The apartment building was about a mile and one-half from the barbershop.

Search of the Feliz Drive apartment

Detectives Moore and Dossey went to apartment A at 900 Feliz Drive. There were two females, two males, and children inside. The detectives conducted limited

protective sweeps for the suspects and weapons. Dossey conducted a protective sweep of the bedroom area and did not find anything.

Detective Moore conducted a protective sweep of the kitchen and laundry room. He opened the dryer door because he had experienced previous searches where suspects had hidden inside the machines. Inside the dryer, he found two dark-colored, hooded sweatshirts which were wet. One sweatshirt had multi-colored stitching.

Moore also found a white plastic shopping bag on top of the washing machine. He opened the bag to determine if the stolen gun was inside. He did not find a gun, but discovered a sheriff's badge, a wallet, a Dodge car key, a handcuff key, and credit cards.

The apartment was subsequently searched pursuant to a warrant, and the officers seized a black-striped, knit ski cap and a pair of black gloves. The white plastic bag contained Key's wallet, Williams's wallet, a deputy sheriff's badge, credit cards, Mosley's wallet and flat badge wallet, binoculars taken from Mosley's car, and Mosley's sunglasses and reading glasses.

Interview with Ashli Winters

On March 5, 2009, Detectives Findley and Miller interviewed Ashli Winters at the police department. Findley testified they never shouted at or threatened her. At the beginning of the interview, Winters said she had seen a news report about the barbershop robbery on television, and she knew the police were looking for her. However, Winters told the detectives that she had been at a friend's house the entire day. Detective Miller told Winters that they believed she was holding back information from the police, she was considered a suspect, and she was believed to have harbored and aided the suspects' escape. Miller told Winters that she could go to jail for that offense, and she could lose custody of her children. Winters became upset, but she was reluctant to get involved and did not want to testify. She indicated that she had a close relationship with Harris.

Detective Findley testified the police had released the names of Patrick Harris and "Carlos Cruz," later corrected to "Carlos Ruiz," to the media as possible suspects.

However, the detectives never gave Winters any information about the suspects' nicknames or the type of property stolen, and this information had not been released to the media. During the interview with Winters, she mentioned "No Sense" and "A-Loc." She described Harris's hooded sweatshirt. Winters told the detectives that she dropped off defendant and Harris a couple of blocks away from the barbershop, and she told them about the conversation between the two suspects when she later picked them up. Winters revealed the time and location where she picked up the two suspects later that afternoon. Winters volunteered that she knew jewelry had been stolen during the robbery and gave detailed descriptions of some of the pieces.

The black wool cap found under the driver's seat of the stolen car was subsequently analyzed by a criminalist, who determined that it contained the DNA of at least three people: one major DNA contributor and two minor DNA contributors. The criminalist determined defendant was a major contributor to the DNA profile on the cap. The other contributors were not determined. DNA tests were inconclusive as to whether Harris was a contributor. There was a possibility that a female could be a minor contributor.

In April 2009, a few weeks after the robbery, Mosley's handgun was found during a traffic stop of an unrelated vehicle. A male and female were in the car, and the female had some relation to a gang.

TESTIMONY OF THE GANG EXPERT

Bakersfield Police Officer Josh Finney testified as the prosecution's gang expert. He had been with the police department for six years and worked in the gang unit for three and one-half years. He focused most of his attention on the ESC, and had been involved in hundreds of arrests and contacts involving members of the ESC. He had testified as a gang expert more than 10 times and over half of those cases involved the ESC.

The East Side Crips

Finney testified the ESC was a criminal street gang in Bakersfield and had hundreds of members. The ESC claimed royal blue and used the letters "E-S-C" as identifying marks. Finney explained that within the ESC, there were subsets based on streets or geographic areas within the traditional boundaries of the ESC. The ESC was "like an umbrella with several groups underneath it." The 11th Street Project Crips, Stroller Boy Crips, and Lakeview Gangster Crips were subsets of the ESC.

Finney explained that the ESC's traditional territory included Key Barbershop, McNew Court, and the apartment building at 900 Feliz Drive, where the robbery proceeds were found. Winters had dropped off defendant and Harris at Miller Street, which was near the border of ESC territory. Feliz Drive was heavily frequented by members of the ESC. There had been shootings at that location, and officers had made "countless arrests" there for narcotics and firearms offenses. The hand sign for the Stroller Boy Crips was an upside down "F," representing Feliz.

The 11th Street Project Crips claimed the housing area along East California and East 10th and 11th Streets. That subset used the numbers 11 or 1100 "P-J-C" as identifying marks, and "900" representing the 900 block of Feliz Drive.

Finney testified that based on his investigations, the primary activities of the ESC included murders, assaults with deadly weapons, assaults, robberies, carjackings, and narcotics possession and sales.

Predicate offenses

Finney testified he was familiar with two predicate offenses involving members of the ESC. On May 7, 2006, Meko Seward, a Country Boy Crip, was shot and killed by Anthony Taylor, a member of the ESC, after they had an altercation. Taylor was convicted of murder and attempted murder with gang enhancements and sentenced to life without parole plus 25 years.

Finney testified that on July 11, 2005, Jimmy Gray, an ESC, entered Jalisco Jewelers with three other members of the ESC. They committed an armed robbery and took $13,000. Gray pleaded guilty to robbery with gang enhancements and was sentenced to 16 years.

Patrick Harris

Officer Finney testified to his opinion that at the time of the barbershop robbery, Patrick Harris was associated with the ESC and the 11th Street Project Crips. Harris's gang moniker was "Lil No Sense." On May 2, 2008, Finney arrested Harris on a warrant. Harris identified himself as an ESC and said he was from the projects. Harris had the number "1" tattooed under each eye, signifying the 11th Street Project Crips. He had other tattoos on his body indicating membership in the ESC.

Defendant

Finney also testified to his opinion that defendant was an active member of the ESC at the time of the barbershop robbery. Defendant had numerous contacts with the police while with other members of the ESC; he previously admitted to being a member of the ESC; he had distinctive gang tattoos; an older member of the ESC identified defendant as a member; and defendant called other gang members from jail.

Defendant appeared to be Hispanic. Finney explained that while most members of the ESC were African-American, the gang also had members who were Hispanic, Asian, or Caucasian.

Finney testified about numerous contacts between defendant and the officers from the gang unit, which occurred from 2005 to 2008, where defendant was found either in residences or in the presence of other members of the ESC.

On October 29, 2008, Finney and his partner encountered defendant with other known members of the ESC. Defendant admitted to being an active member of the ESC. Defendant said his moniker was "Lil A-Loc," and that he received his moniker from

Adam "A-Loc" Maya, because both defendant and Maya were Hispanic members of the ESC.

Finney testified defendant also said, " 'Hell, yeah, I'm East Side.' " Defendant was "very open and sounded proud when saying he was an active member" of the ESC. Defendant said he did not grow up within the gang's traditional boundaries, but he went to school with other members of the ESC. Defendant said he was never jumped into the gang, but he just started to hang around with them. Defendant also admitted he was from the 11th Street projects.

In November 2008, Finney and other gang officers were serving an arrest warrant at the residence of another known member of the ESC. Defendant was present with other members of the ESC. Tierre Hester, Sr., an older member of the ESC was also present, and said that everyone at the house was a member of the ESC.

Finney testified that defendant lived nearly five miles outside the gang's traditional boundaries, but he was regularly contacted within the ESC boundaries, and with ESC members, which showed that he went out of his way to associate with the ESC.

Defendant's tattoos included an "E" on his left calf and an "S" on his right calf. He also had a cross with "RIP" and "A Loc" on his left arm, referring to Adam Maya, who had died. Defendant had admitted his gang moniker was "Lil A-Loc," which was derived from Maya's nickname. Finney explained that adopting a dead gang member's moniker was something that had to be earned. Maya had been a popular and respected member of the ESC, and a gang member had to "put in work or show his devotion to the gang in order to use that nickname."

Finney further testified that from April 2009 to June 2009, defendant was in the local jail, and his telephone calls were monitored. During one call, defendant stated, "East Side Crip 1100." Finney explained that "1100" was one of the symbols used by members of the ESC to refer to the 1100 block of the 11th Street Project Crips. Defendant also said, "East all the time," which was a greeting used by ESC members.

Defendant said, "Js up," which referred to the 11th Street Project Crips, because they wore prominent baseball caps for the Toronto Blue Jays, with the "J" representing the projects. Defendant also talked about "Crippin," which Finney explained meant "just living the Crip life style, being a Crip."

Hypothetical questions[7]

The prosecutor asked Officer Finney a series of hypothetical questions:

> "An armed robbery of a business. Victims inside the business, there are a few of them, more than two. And two robbers come. They are completely—they have masks on and are covered up so they cannot be otherwise identifiable, armed with a firearm. They take money and jewelry from the victims and keys, take a car, and flee from the site and dump the car, flee to another site, and then move from that sit or are picked up from that site and driven out of the area, and are dropped off at a last location, all of the various locations being with gang territory, and the items being taken include a gun, money, jewelry, car. [¶] Assuming gang culprits are the robbers, how would that benefit, it at all, the gang?"

Defense counsel objected to an improper hypothetical. The court overruled the objection. Finney responded:

> "An armed robbery, as such, would [benefit] the gang in a couple of ways. The first and most obvious would be the items taken, some type of monetary gain, the jewelry, money, and firearm taken. The way I'd best like to describe it is it's not like these guys go back to a hiding spot and divvy up what they have taken amongst all the members of the gang. It benefits the gang in a less obvious way, as far as the gun can be passed around to be used by other members, by these two members receiving some type of income or some monetary gain, they are able to purpose vehicles, buy things for other members of the gang—"

Defense counsel again objected as speculation. The court overruled the objection. Finney continued:

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[7] As we will explain in issues III, IV, and V, *post*, defendant contends the court should have granted his objections to the nature of the prosecutor's hypothetical questions and Officer Finney's responses.

> "A good way to describe it is when a kid is growing up, if they don't receive [an] allowance, they still benefit from their parents having a job. Even though they are not directly receiving money, they still benefit from the parent having a job."

The court overruled defense counsel's objection for an improper analogy.

The prosecutor asked Finney to explain the "trickle-down" effect. Finney testified:

> "[T]he trickle-down effect is that, by this one gang member receiving money and being able to have a place to live or a vehicle, other members can hang out at their house or stay at their house, drive their vehicle, use their items. That's the trickle-down effect where they are not dividing a couple hundred dollars amongst several hundred members. It's the trickle-down effect in that the other members of the gang benefit from that member gaining that money or that jewelry."

The court overruled defense counsel's foundational and speculation objections.

The prosecutor asked Finney about the impact of such a crime on the community. Finney explained that no one would be afraid of a gang that did not use guns or weapons. By using a firearm during a robbery and putting everyone on the ground at gunpoint, "citizens in that area are going to be afraid of this gang, because they know that they possess firearms, that they are out there using them. And, also, rival gangs hear of crimes that this gang is committing with the firearms. And that also affects them."

The prosecutor continued with the hypothetical question:

> "Q. Add to the hypothetical … that the individual robbers do not declare, during the course of the robbery, a membership in the gang. They do not identify themselves verbally or otherwise as to the specific gang member. [¶] Does that militate against it being a gang-related event?
>
> "A. No, absolutely not. There is no need or reason to do it. It's deep within the traditional boundaries and the stronghold of the East Side Crips. It's a given that if it's a gang committing this crime, that it's East Side Crips."

Defense counsel moved to strike for facts not in evidence. The court overruled the objection.

The prosecutor asked Finney whether his opinion would change if "the individual perpetrators or suspects are not found in possession of stolen property by a law enforcement [officer] when they are contacted by law enforcement." Finney said no and explained:

> "I've witnessed a suspect running from a scene with part of the loss of what they took, and chased that suspect for a block or two. And when I eventually caught him, I found they were no longer in possession. And I could not find what they had taken or where they had thrown it. [¶] So the fact that there was a month that had passed and the suspects were contacted or arrested several states [*sic*] away had no bearing on the facts—"

Defense counsel objected for facts not in evidence and prejudice. The court sustained the objection.

The prosecutor continued with his hypothetical questions and the following exchange ensued:

> "Q. As to the last, in reference to almost a month later and suspect contacted several states [*sic*] away, who are you referring to?
>
> "[DEFENSE COUNSEL]: Objection. Relevance. Move to strike.
>
> "THE COURT: Sustained.
>
> "Q. Do you know, with regard to the defendant, when-- [¶] And just answer 'yes' or 'no.' [¶] --[W]hen and where he was arrested?
>
> "[DEFENSE COUNSEL]: Objection. Relevance.
>
> "THE COURT: Overruled.
>
> "[FINNEY]: Yes.
>
> "[Q.] Does that have any significance with regard to your testimony in this regard?
>
> "A. Not really."

The prosecutor ended his direct examination questions.

Cross-examination of expert

On cross-examination, defense counsel elicited testimony from Finney that he did not know whether defendant knew any of the gang members who had been convicted in the predicate offenses. Finney admitted that he did not arrest defendant when he found defendant in the company of other members of the ESC. Finney also admitted that he did not know whether defendant had been jumped into the ESC, and that someone could be an "associate" or "wannabe" just by hanging out with other gang members.

In response to further defense questions, Finney testified that Jonathan Lee was Patrick Harris's half-brother, Lee was a member of the ESC, Harris and Lee committed a robbery/homicide together about six weeks before the robbery of the barbershop, and defendant was not involved in that offense.[8]

Finney conceded he did not have any personal information as to the application of the "trickle-down" theory to the ESC from the barbershop robberies, and acknowledged that the stolen car was abandoned. Finney also conceded that the jewelry and/or gun taken during the barbershop robbery were not given to other members of the ESC. However, Finney testified that Mosley's gun was later found in a vehicle, and the occupants of the vehicle were connected to the ESC.

Redirect examination testimony

On redirect examination, the prosecutor again asked Finney hypothetical questions. In response, Finney testified that if a gang member committed a robbery in his own territory, against people who were not in the gang, "there is no need for him to say, 'This is such and such gang committing this robbery.' It doesn't benefit him in any way." Finney explained that a gang member would identify himself if he was involved in

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[8] As we will explain in issue I, *post*, defendant was initially charged in a consolidated information which included murder, burglary, and robbery charges against Harris, Lee, and Landon Reynolds, based on a home invasion which occurred in April 2009. Defendant was never alleged to have participated in the home invasion.

a conflict with a person from a rival gang. "But just committing a robbery of citizens, there is no need for it."

Finney clarified that Mosley's stolen gun was found on April 7, 2009, during the traffic stop of a vehicle. A male and female were in the car, and the female had some relation to a gang. Mosley's stolen car was abandoned in the territory of the ESC, and the two suspects ran to another location within the traditional boundaries of the ESC.

DEFENSE EVIDENCE

Defendant did not testify.

Detective Kennemer testified that about 30 minutes after the barbershop robbery, he took Mosley to Feliz Drive for a show-up on Alton Gunter and Terrance Ellis, who had been in the apartment. Mosley could not positively identify anyone.

Detective Dossey testified that Victoria Campbell described the two running suspects as African-American males.

Officer Ryan Williams testified that on April 6, 2009, he conducted a traffic stop on a vehicle driven by Brandon Jackson, an African-American. Mosley's stolen gun was found under the driver's seat.

A criminalist testified that clothing and DNA samples were taken from Terrance Ellis and Alton Gunter as part of the investigation into the barbershop robbery. Another criminalist testified that a latent fingerprint for Brandon Jackson was found on the stolen firearm.

DISCUSSION

I. DEFENDANT'S RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED

When criminal proceedings began in this case, defendant and codefendant Patrick Harris were jointly charged with the offenses arising from the barbershop robberies and carjacking, which occurred on March 4, 2009. Thereafter, the prosecution sought to consolidate the barbershop crimes with first degree murder, burglary, and robbery charges filed against Harris and two accomplices, based on a home invasion/murder

which occurred on April 9, 2009. There was no apparent connection between the barbershop robberies and the home invasion/murder incident. There were different victims, the incidents happened at different locations, and defendant was never alleged to have been involved in the home invasion/murder case. However, Patrick Harris was alleged to have been involved in both incidents. Harris's accomplices in the home invasion/murder case were allegedly members of the ESC, and the prosecution further alleged that both the barbershop robberies and the home invasion/murder were committed by members of and for the benefit of the ESC.

The court granted the consolidation motions. Thus, defendant and codefendant Harris were charged in a consolidated information with multiple felonies based on the barbershop incident, and Harris and two other codefendants were charged with multiple felonies based on the home invasion/murder incident; defendant was not charged with any offenses arising from the home invasion/murder.

During the lengthy pretrial proceedings, the court granted continuances for the jury trial on the consolidated information, based on the representations by codefendant Patrick Harris's two attorneys. Harris's first attorney declared he was not ready and that he had a conflict. The court relieved Harris's first attorney, but his second attorney also declared he was not ready for trial. The court found good cause and continued the jury trial on the consolidated information filed against defendant, Harris, and two other codefendants, over defendant's repeated objections that the continuances violated his right to a speedy trial.

As we will explain, the prosecution eventually elected to sever the home invasion/murder case from the barbershop case, and defendant was tried by himself only for the barbershop carjacking and robberies.

On appeal, defendant now contends the court violated his right to a speedy trial when the court granted codefendant Harris's motions for continuances of the jury trial on the consolidated information.

This case has a fairly complicated procedural history. As we will explain, however, the entirety of the record demonstrates the court had good cause to grant the continuances and defendant's right to a speedy trial was not violated.

A. Speedy trial principles

We begin with the relevant legal principles. "The state and federal Constitutions guarantee a defendant facing criminal charges the right to a speedy trial. [Citations.] This right protects an accused from facing an unduly lengthy period in which criminal charges are pending. [Citation.]" (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1193 (*Hajjaj*).) The United States Supreme Court has set forth the following four criteria by which the right to a speedy trial is to be judged: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." (*Barker v. Wingo* (1972) 407 U.S. 514, 530 (*Barker*), fn. omitted.)

"In California, one of the principal statutes implementing the constitutional right to a speedy trial is section 1382." (*Hajjaj, supra,* 50 Cal.4th at p. 1193.) Section 1382, subdivision (a) provides in relevant part:

> "The court, *unless good cause to the contrary is shown,* shall order the action to be dismissed in the following cases: [¶] ... [¶] (2) In a felony case, when a defendant is not *brought to trial* within 60 days of the defendant's arraignment on an indictment or information .... However, an action shall not be dismissed under this paragraph if either of the following circumstances exists: [¶] (A) The defendant enters a general waiver of the 60-day trial requirement.... [¶] (B) The defendant requests or consents to the setting of a trial date beyond the 60-day period.... Whenever a case is set for trial beyond the 60-day period by request or consent, expressed or implied, of the defendant without a general waiver, the defendant shall be *brought to trial* on the date set for trial or within 10 days thereafter." (Italics added.)

"In other words, in the absence of waiver or consent on the part of the defendant, section 1382 'requires dismissal when a defendant is not "brought to trial" within the statutorily prescribed period after the filing of the information,' unless *good cause is shown*. [Citations.]" (*Hajjaj, supra,* 50 Cal.4th at p. 1194, italics added.)

"If the defendant is not 'brought to trial' within the statutory period, dismissal is required unless the trial court, in the exercise of its discretion, determines that *good cause* has been demonstrated. [Citations.] In order to avoid dismissal, the prosecution must meet the burden of demonstrating good cause for delay. [Citation.]" (*Hajjaj*, *supra*, 50 Cal.4th at p. 1197.)

"Section 1382 does not define 'good cause' as that term is used in the provision, but numerous California appellate decisions that have reviewed good-cause determinations under this statute demonstrate that, in general, a number of factors are relevant to a determination of good cause: (1) the nature and strength of the justification for the delay, (2) the duration of the delay, and (3) the prejudice to either the defendant or the prosecution that is likely to result from the delay. [Citations.] Past decisions further establish that in making its good-cause determination, a trial court must consider all of the relevant circumstances of the particular case, 'applying principles of common sense to the totality of circumstances....' [Citations.] The cases recognize that, as a general matter, a trial court 'has broad discretion to determine whether good cause exists to grant a continuance of the trial' [citation], and that, in reviewing a trial court's good-cause determination, an appellate court applies an 'abuse of discretion' standard. [Citations.]" (*People v. Sutton* (2010) 48 Cal.4th 533, 546 (*Sutton*), fn. omitted; *Hajjaj*, *supra*, 50 Cal.4th at pp. 1196-1197.)

"Past California decisions have examined a wide variety of circumstances that have been proffered or relied upon as a basis under section 1382 for finding good cause to delay a trial, including (1) the unavailability of a witness, (2) the unavailability of a judge, (3) the unavailability of a courtroom, (4) counsel's need for additional time to prepare for trial, (5) the unavailability of counsel, and (6) the interest in trying jointly charged defendants in a single trial. [Citations.]" (*Sutton*, *supra*, 48 Cal.4th at p. 547; *Hajjaj*, *supra*, 50 Cal.4th at p. 1198.)

"[A] broad variety of unforeseen events may establish good cause under section 1382 …." (*Hajjaj*, *supra*, 50 Cal.4th at p. 1198.) As a related matter, section 1098 embodies a legislative preference for joint trials. (*People v. Boyde* (1988) 46 Cal.3d 212, 231-232.) Section 1050.1 further states:

> "In any case in which *two or more defendants are jointly charged* in the same complaint, indictment, or information, and the court or magistrate, *for good cause shown*, continues the arraignment, preliminary hearing, or trial *of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants' cases so as to maintain joinder*. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time." (Italics added.)

The determination of "good cause" or a "reasonable period of time" is left to the trial court's exercise of discretion, which is reviewed for an abuse of that discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

"[I]f the precipitating cause for trial delay is justifiable, such as codefendants' need to adequately prepare for trial, then the section 1098 joint trial mandate constitutes good cause to delay the trial of an objecting codefendant." (*Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487, 501, fn. omitted.) For example, in *Sutton*, *supra*, 48 Cal.4th 533, the California Supreme Court held that a trial court acted within its discretion in finding good cause to continue a jointly charged codefendant's trial because his counsel was unavailable due to engagement in another trial. (*Id.* at pp. 556-558.) *Sutton* further held that the substantial state interests served by proceeding in a single joint trial supported a finding of good cause, such that the engagement of codefendant's counsel in another matter was good cause to continue the joint trial of both jointly charged defendants. (*Id.* at pp. 558-562.)

In contrast, however, "the unavailability of a number of judges or courtrooms sufficient to handle the court's caseload, *due to chronic congestion* of the court's docket,

does not establish good cause, absent exceptional circumstances." (*Hajjaj, supra*, 50 Cal.4th at p. 1198, italics in original.)

With these principles in mind, we turn to the complicated procedural history of this case. The entirety of the record, however, demonstrates the court had good cause to continue the matter on two occasions.

B. The barbershop robbery/carjacking complaint

On March 4, 2009, the barbershop robbery and carjacking occurred. On April 14, 2009, a felony complaint was filed which jointly charged defendant and codefendant Harris with counts I through IV, four counts of robbery, and count V, carjacking of Mosley's vehicle, with gang enhancements. Harris was separately charged with count VI, possession of a firearm by a felon. On April 17, 2009, defendant was arraigned and counsel was appointed.

C. The home invasion/murder complaint

According to the prosecution, Patrick Harris was involved in another gang-related offense which occurred on April 9, 2009. On that date, Harris and Jonathan Lee allegedly arrived at a party. They were denied entry into the house; Harris pulled a gun and shot an occupant in the doorway. Harris and Lee forced their way into the house announced it was a robbery and they would shoot someone. A 17-year-old boy was fatally shot. Harris and Lee fled in their car and abandoned the vehicle a few blocks away. Harris and Lee were immediately apprehended, and Harris was identified as the gunman. The prosecution alleged the suspects were members of the ESC and offenses were committed for the benefit of the ESC.

On or about April 14, 2009, a felony complaint was filed in the home invasion/murder case against Patrick Harris and Jonathan Lee, charging them with count I, first degree murder with special circumstances; count II, robbery; count III, burglary; count IV, conspiracy to commit burglary; and count V, assault with a firearm; with gang enhancements.

Defendant was not charged in the complaint, and there is no evidence in this record that he was involved in or committed any offenses connected to the home invasion/murder charges.

D. The first motion to consolidate

On May 4, 2009, the prosecution moved to consolidate the barbershop robberies/carjacking case against defendant and codefendant Harris, with the home invasion/murder case against Harris and Lee. The prosecution argued that both incidents were gang-related and committed for the benefit of the ESC; the barbershop robbery/carjacking was admissible as a predicate offense in the home invasion/murder case; and both incidents were similar "takeover-type robberies" committed with another gang member.

Defendant opposed consolidation and argued he was not involved in the home invasion/murder case, there was no transactional connection between the two incidents, the victims and locations were unrelated, there was no evidence that defendant knew anything about the incident, the only connection was Harris's involvement in both incidents, and consolidation would be extremely prejudicial to defendant because the unrelated case alleged first degree murder with special circumstances.

At some point in April or May 2009, a doubt was raised as to Patrick Harris's competency. The court suspended proceedings and appointed experts to evaluate Harris. On or about May 18, 2009, the court found Harris was competent.

On June 1, 2009, the court heard the motion to consolidate. The prosecutor clarified that the consolidation motion was only for purposes of the preliminary hearing. Defendant's attorney stated he would not oppose consolidation for that limited purpose. The court granted the motion only for purposes of the preliminary hearing.

On June 15, 2009, the consolidated complaint was filed: counts I through IV charged Harris and Lee with first degree murder, burglary, and robbery with gang enhancements, based on the April 9, 2009, home invasion; counts V-IX charged

defendant and Harris with the barbershop robberies and carjacking, with gang enhancements; count X charged Harris with possession of a firearm by a felon during the barbershop robbery; and count XI charged defendant, Harris, and Lee with the substantive gang offense.

On the same day, the court began the preliminary hearing for the consolidated complaint. Defense counsel clarified that he did not object to filing the consolidated complaint for the preliminary hearing, but he objected to consolidation for trial. The court held defendant and the two codefendants to answer on all charges and allegations in the consolidated complaint.

E. The consolidated information

On June 22, 2009, a consolidated information was filed: counts I through IV charged Harris and Lee with the home invasion/murder case, with gang enhancements; counts V-IX charged defendant and Harris with the barbershop robberies and carjacking, with gang enhancements; count X charged Harris with possession of a firearm by a felon during the barbershop robbery; and count XI charged defendant, Harris, and Lee with the substantive gang enhancement, based on both incidents.

F. Defendant's waiver of time

On July 2, 2009, the court relieved defendant's appointed counsel and appointed conflict counsel to represent him. Defendant was arraigned and pleaded not guilty. According to the minute order, "[d]efendant waive[d] time for trial," and "[d]efendant waive[d] time for an additional 10 court days." The court set pretrial motions for the jury trial on the consolidated information for October 20, 2009; the readiness hearing for November 20, 2009; and trial for December 7, 2009.

G. Pretrial motions and codefendant Harris's competency

On September 23, 2009, defendant moved to dismiss the entirety of the charges against him for several reasons, including the court's decision to consolidate the home invasion/first degree murder case with the barbershop robberies and carjacking case for

purposes of the jury trial. Defendant argued that consolidation violated his due process rights because he was not involved in the home invasion incident.

At some point in October 2009, defense counsel for codefendant Harris declared a doubt as to his competency, and the court again suspended proceedings for Harris pursuant to section 1368.

On November 6, 2009, the court denied defendant's motion to dismiss based on the consolidation of the two cases.

H. Codefendant Harris's motion to continue

On November 20, 2009, the court convened a hearing on codefendant Harris's motion to continue his jury trial on the consolidated information. Harris's attorney explained that criminal proceedings for Harris had been suspended to determine his competency. A competency trial was scheduled for November 30, 2009, before a different judge. Harris's attorney stated the competency trial would have to be continued because two competency experts were not available to testify. As a result, Harris's attorney also wanted to continue the jury trial on the consolidated information until Harris's competency was resolved.

The court stated that a continuance of the jury trial would affect the trial dates for defendant and codefendant Lee in the consolidated case. The court admonished Harris's attorney to subpoena the competency experts to avoid continuing the competency hearing. The prosecutor asked the court to continue the jury trial for all the defendants if it was inclined to grant Harris's motion for a continuance because she wanted the cases to remain consolidated. If Harris was found competent, the prosecutor intended to continue with the consolidated trial as to all three defendants. If Harris was not found competent, she intended to proceed with a jury trial on the consolidated information only as to defendant and Lee.

Defendant's attorney opposed any continuance and stated he was ready for trial. Counsel argued there was no legal basis to continue defendant's trial based on questions

about whether codefendant Harris was competent. Codefendant Lee's attorney also opposed the continuance. The prosecutor asked the court to keep the cases consolidated and only grant the continuance until December 7, 2009.

The court was not willing to continue the consolidated jury trial on the substantive charges simply because one expert could not change his schedule to appear for Harris's competency trial. The court asked Harris's attorney whether he was ready for trial if Harris was found competent. Harris's attorney stated that he would not be ready for trial on the substantive charges regardless of the competency matter, and he would likely file another motion for a continuance.

The court denied Harris's motion to continue the jury trial on the consolidated information without prejudice. The court reconfirmed trial for December 7, 2009. The court further stated that it would not grant any continuances without a showing of good cause because of the possible impact on the codefendants.

I. <u>Codefendant Harris found competent</u>

On Monday, December 7, 2009, the court convened for the scheduled trial on the consolidated information. However, the competency hearing for codefendant Harris had not been completed. The court asked the parties to return on Wednesday, December 9, 2009, to "find out whether Mr. Harris will be joining us or what would your pleasure be?" Defendant's attorney preferred to trail the matter to Monday, December 14, 2009, but he left it up to the court. The court decided to trail until December 9, 2009, to determine Harris's status. Defendant did not object.

On December 9, 2009, the court reconvened, and the prosecutor asked to trail the matter until Monday, December 14, 2009. The court continued the matter without objection from defendant.

On December 11, 2009, Harris was found competent after a jury trial, and criminal proceedings in the consolidated information were reinstated against him.

J. Codefendant Harris's motion to continue

On December 14, 2009, the court convened with defendant and codefendants Harris and Lee. The court noted Harris had been found competent. Harris's attorney stated he was not ready for the jury trial on the consolidated information. In addition, Harris's attorney asked to be relieved because information had been disclosed during the competency trial which indicated a conflict between Harris and the public defender.

The prosecutor stated he did not have a good faith belief about the existence of a conflict between Harris and his public defender and asked the court to conduct an in camera hearing on the issue. However, the prosecutor argued there was good cause for a continuance of the jury trial on the consolidated information. The prosecutor noted that even if there was not a conflict, Harris's attorney had stated he was not ready for trial. In addition, if the court found a conflict, a new attorney would have to be appointed for Harris, and that attorney would not be ready either.

After an in camera hearing, the court stated that there was good cause to declare a conflict between Harris and his attorney.

The prosecutor again noted that aside from the conflict, there was still good cause to continue the jury trial on the consolidated information because Harris's attorney had already stated that he was not ready for trial. Harris's attorney agreed that he was not prepared for trial, and he would have moved for a continuance if he had not been relieved.

The court relieved Harris's public defender and appointed conflict counsel to represent Harris. Harris's new attorney stated that discovery was "one banker box" and requested trial set "in the normal course." Harris declined to further waive time.

The court granted the continuance and set the trial readiness hearing for January 15, 2010, and trial for January 25, 2010. Defendant's attorney objected. Defendant argued the barbershop charges against him should be severed from the home invasion/murder case, since defendant was not involved in the home invasion.

Defendant's attorney declared he was ready for trial and there was no basis to continue defendant's case. Codefendant Lee's attorney also objected to any continuance.

The prosecutor replied that he wanted to keep the entire case consolidated, and there was good cause to continue the consolidated matter. The court again asked Harris's just-relieved attorney if he would have been ready for trial in the absence of the conflict. Harris's counsel again explained that he would not have been ready even if there had not been a conflict because he was still waiting for discovery and to hire a DNA consultant.

The court overruled defendant's objections and found good cause to continue the jury trial on the consolidated information, based on the appointment of new counsel to represent Harris and the complexity of the case. The court set pretrial motions for January 5, the readiness hearing for January 14, and the trial for January 25, 2010.

K. Defendant's speedy trial motion to dismiss

On December 17, 2009, defendant moved to dismiss all charges against him because of the alleged denial of his right to a speedy trial, based on the court's decision to grant the continuance over defendant's objections. Defendant also argued his due process right to a fair trial was violated when the court consolidated his case with the unrelated home invasion/murder case of Harris and Lee.

L. The prosecution's second motion to consolidate

In the meantime, Landon Reynolds was charged with several counts based on his participation in the home invasion/murder case with Harris and Lee. Reynolds was not alleged to have been involved in the barbershop robberies, and defendant was not alleged to have been involved in the home invasion.

At some point in December 2009, the prosecution moved to include Landon Reynolds as another codefendant in the consolidated information, so that the consolidated information would again charge defendant and Harris with the barbershop robberies, but also charge Harris, Lee and Reynolds the offenses based on the home invasion/murder case.

On December 29, 2009, defendant filed opposition to consolidating his case with that of Reynolds, since Reynolds was not involved in the barbershop robberies and defendant was not involved in the home invasion incident. Defendant again moved for dismissal because of the denial of his right to a speedy trial.

M. The court's denial of defendant's motion to dismiss

On January 6, 2010, the prosecution filed opposition to defendant's motion to dismiss for violation of his right to a speedy trial. The prosecution noted that defendant had waived time until December 14, 2009. The prosecution argued defendant's speedy trial rights were not violated because there was good cause to continue the consolidated case on that date, based on the statements of Harris's attorney that he was not prepared, and the court's determination that Harris's attorney had to be relieved and new counsel appointed.

The prosecution also filed a response to defendant's opposition to consolidate his case with Reynolds, and argued the barbershop and home invasion crimes were related because they were committed for the benefit of the ESC.

On January 22, 2010, the court heard arguments on defendant's motion to dismiss for violation of his right to speedy trial. The court denied the motion without comment. The court also heard and granted the prosecution's motion to include Landon Reynolds in the consolidated case.

On the same date, the court conducted a trial readiness conference. Harris's new attorney said he was not ready for trial or even the readiness conference because discovery in the consolidated case was voluminous. Harris's attorney stated he only had the case for a month, he needed at least three months to prepare for the DNA evidence, and he reminded the court that Harris faced a life term. He requested a trial date in May 2010.

The prosecutor stated that in light of codefendant Harris's motion to continue, he would also move to continue the consolidated case pursuant to section 1050.1, because

"good cause for one would be good cause for all" since defendant and Harris were charged in a consolidated information. Defendant objected and again argued a continuance would violate his right to a speedy trial.

The court found good cause to continue the jury trial on the consolidated information against defendant and codefendants Harris, Lee and Reynolds, pursuant to section 1050.1, and set the trial for June 7, 2010.

N. The second consolidated information

On January 29, 2010, the second consolidated information was filed: counts I through IV charged Harris, Lee, and Reynolds with murder, burglary, and robbery based on the home invasion case, with gang enhancements; counts V through IX charged defendant and Harris with the barbershop robberies and carjacking, with gang enhancements; count X charged Harris with possession of a firearm by a felon during the barbershop robberies; and count XI charged defendant, Harris, Lee, and Reynolds with the substantive gang offense.

O. Denial of defendant's subsequent motion to dismiss for violation of his speedy trial rights

On March 11, 2010, defendant filed another motion to dismiss based on the alleged violation of his right to a speedy trial. Defendant argued that he was not brought to trial within 10 days of his two previous trial dates of December 14, 2009, and January 25, 2010, pursuant to section 1382.

The prosecution filed opposition and again argued there had been good cause to continue the case on both occasions, since Harris's first attorney had not been prepared, he was relieved because of a conflict, and Harris's new attorney was not prepared for trial.

On April 28, 2010, the court heard and denied defendant's motion to dismiss for the alleged violation of his speedy trial rights. The jury trial on the consolidated information was set for June 7, 2010.

P. Severance of defendant's case

As demonstrated *ante*, the prosecution sought to consolidate the barbershop robbery charges against defendant and Harris with the home invasion/murder charges against Harris, Lee and Reynolds. The prosecution repeatedly opposed defendant's objections to consolidation and argued that all defendants should be tried together on the consolidated information.

Nevertheless, on or about June 2, 2010, the prosecution advised the court that defendant and codefendants Harris, Lee, and Reynolds did not have to be tried to together on the consolidated information. On its own motion, the prosecution moved to sever the charges against defendant based on the barbershop robberies and carjacking from the home invasion/murder charges against the codefendants. The prosecution elected to proceed to trial solely against defendant for the barbershop case without codefendant Harris. The record is silent as to why the prosecution withdrew its objections to severance.

Thereafter, criminal proceedings in this case continued solely against defendant for the crimes based on the barbershop robberies. Harris was not tried with him.

Q. Further speedy trial objections

On June 15, 2010, defendant's jury trial began with motions in limine. Defendant again moved to dismiss for violation of his speedy trial rights. The court denied the motion and found the prosecution had sought to consolidate the barbershop and home invasion cases in good faith, and the prosecution had not abused the consolidation process. The court further found that the subsequent severance of defendant's case from the other codefendants did not indicate the prosecution had committed misconduct when it previously consolidated the cases.

After defendant was convicted, he filed a motion for new trial based on several contentions, including the violation of his right to a speedy trial. The court again denied the motion for the reasons it had previously stated.

R. Relevant authority

Defendant contends the court violated his right to a speedy trial when it repeatedly continued the jury trial on the consolidated information based on the problems stated by codefendant Harris's attorneys. Defendant's arguments are similar to those which were rejected in *Sutton*.

As noted *ante*, *Sutton* involved two codefendants who were jointly charged. The trial court continued Jackson's case because his attorney was engaged in another trial. The court also continued Sutton's case because Jackson's attorney was unavailable. (*Sutton*, *supra*, 48 Cal.4th at pp. 540-544.) On appeal, Sutton argued that being jointly charged with Jackson did not constitute good cause to continue his trial for purposes of section 1382. (*Id.* at pp. 544-545.)

The California Supreme Court held that Sutton's right to a speedy trial had not been violated:

> "[W]hen, as here, two defendants are jointly charged in an information and the trial court continues the trial as to one of the defendants for good cause, section 1050.1 provides that the continuance of the trial as to that defendant constitutes good cause to continue the trial 'a reasonable period of time' as to the other defendant in order to permit the defendants to be tried jointly." (*Sutton*, *supra*, 48 Cal.4th at p. 558-559.)

The court found the engagement of Jackson's defense attorney in another trial constituted a legitimate ground to delay Jackson's trial and, "in light of the very brief duration of the delay in the commencement of the trial and the absence of any indication that the delay adversely affected defendants' ability to defend themselves against the charges," the trial court did not abuse its discretion when it found good cause to continue the consolidated matter and denied Sutton's motion to dismiss under section 1382. (*Sutton*, *supra*, 48 Cal.4th at p. 557.)

> "[P]ast decisions of this court make it clear that the substantial state interests served by a joint trial properly may support a finding of good cause to continue a codefendant's trial beyond the presumptive statutory

> period set forth in section 1382. [Citations.] And numerous Court of Appeal decisions properly have applied this general principle. [Citations.] Furthermore, the provisions of section 1050.1 also clearly establish that the state interest in permitting jointly charged defendants to be tried in a single trial *generally* constitutes good cause to continue a defendant's trial to enable that defendant to be tried with a codefendant whose trial properly has been continued to a date beyond the presumptive statutory deadline." (*Id*. at p. 562, italics in original, fn. omitted.)

The court further explained:

> "[A]lthough past California decisions have held that a *lengthy* continuance of an objecting codefendant's trial to facilitate a joint trial is permissible only in instances in which the state interest in avoiding multiple trials is especially compelling--as when the trials are likely to be long and complex and impose considerable burdens on numerous witnesses [citation]--when the proposed delay to permit a single joint trial is relatively brief, the substantial state interests that are served in every instance by proceeding in a single joint trial generally will support a finding of good cause to continue the codefendant's trial under section 1382, even when there is no indication that, were the defendants' trials to be severed, the separate trials would be unusually long or complex. [Citations.]" (*Sutton, supra,* 48 Cal.4th at pp. 559-560, second italics added, fn. omitted.)

The court concluded the superior court "correctly found that the circumstance that defendant Jackson's trial properly was continued beyond the 60-day period constituted a legitimate and appropriate justification for also delaying codefendant Sutton's trial beyond that period. Further, because the trial court continued Jackson and Sutton's trial on a day-to-day basis and the joint trial ultimately commenced only six days after the 60-day period, the duration of the delay in this case clearly was reasonable. Finally, Sutton makes no claim that the short delay in the commencement of the trial adversely affected his ability to defend the charges against him." (*Sutton, supra,* 48 Cal.4th at pp. 562-563.)

S. <u>Analysis</u>

In this case, as in *Sutton*, the entirety of the record demonstrates that defendant's statutory right to a speedy trial pursuant to section 1382 was not violated because there was good cause to grant the continuances in this case. On July 2, 2009, defendant waived time for trial plus for an additional 10 court days. The jury trial on the consolidated

information was set for December 7, 2009. On that day, however, the court determined that Harris's competency had still not been resolved. On both December 7 and 9, 2009, defendant did not object to continuing the matter until the competency issue was clarified, and even agreed to trail the jury trial to December 14, 2009.

Defendant's time waiver remained in effect until December 14, 2009, when he objected to the court's decision to further continue the jury trial on the consolidated information. However, codefendant Harris's public defender stated that he was not prepared for the jury trial on the consolidated information. In addition, the court conducted an in camera hearing and determined the existence of a conflict required relief of Harris's public defender, and conflict counsel had to be appointed.

At that point, defendant and codefendant Harris were charged in the consolidated information with the barbershop carjacking and robberies. Based on *Sutton*, the court did not abuse its discretion, pursuant to section 1382 and section 1050.1, when it decided to continue the trial because Harris's public defender was not prepared; a valid conflict existed between Harris and his public defender; the court had to relieve the public defender; and the court-appointed conflict counsel who stated that he was not prepared for trial that day. Thus, on January 22, 2010, the court properly denied defendant's motion to dismiss for the alleged violation of his right to a speedy trial based on the December 14, 2009, continuance.

In addition, the court did not abuse its discretion when it decided to grant another continuance on January 22, 2009. As set forth *ante*, Harris's newly-appointed attorney stated he was not ready for trial on the consolidated information because of voluminous discovery. Again, defendant was still charged with codefendant Harris in the consolidated information with the barbershop robberies and carjacking. Based on those circumstances, the court properly found good cause to continue the consolidated matter over defendant's objections. For the same reasons, on April 28, 2010, the court properly

denied defendant's subsequent motion to dismiss for the alleged violation of his right to a speedy trial.

After defendant's case was severed from codefendant Harris and the other two codefendants, defendant filed another motion to dismiss during pretrial motions in limine. The court did not abuse its discretion when it denied this motion, and properly found the prosecution had not abused the consolidation process when it sought to file the consolidated information against defendant and codefendant Harris. For similar reasons, the court properly denied defendant's new trial motion to the extent it was based on the alleged violation of his right to a speedy trial.

As in *Sutton*, the consolidated cases were properly joined in this case, the court properly granted continuances in this case for good cause, and it did not abuse its discretion when it denied defendant's motion to dismiss for the alleged violation of his right to a speedy trial. As explained *ante*, the relevant factors to determine good cause under section 1382 are "(1) the nature and strength of the justification for the delay, (2) the duration of the delay, and (3) the prejudice to either the defendant or the prosecution that is likely to result from the delay." (*Sutton*, *supra*, 48 Cal.4th at p. 546, fn. omitted; *Hajjaj*, *supra*, 50 Cal.4th at pp. 1196-1197.) As applied to this case, the nature and strength of the justification for the delays were valid based on the reasons expressed by the attorneys for codefendant Harris. The duration of the delays were not unreasonable, since defendant's jury trial began within six months after he withdrew his time waiver. More importantly, there is no evidence that defendant suffered any prejudice because of the delay. Defendant never stated that any witnesses or evidence became unavailable because of the delay. Indeed, the six-month delay proved beneficial to defendant because the prosecution ultimately withdrew its opposition to defendant's numerous motions to sever his case from that of codefendant Harris and the other codefendants charged in the consolidated information.

We further find that defendant's right to a speedy trial was not violated upon a consideration of federal constitutional factors. As explained *ante*, the relevant criteria are: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." (*Barker, supra,* 407 U.S. at p. 530, fn. omitted.) The length of the delay serves as a "triggering mechanism." (*Ibid.*) Generally, a post-accusation delay is considered " 'presumptively prejudicial' " when it approaches one year. (*Doggett v. United States* (1992) 505 U.S. 647, 652, fn. 1.) In this case, however, there was only a six-month delay between defendant's last waiver of time and the subsequent start of his jury trial.

The second factor, the reasons for the delay, requires "different weights [to] be assigned to different reasons." (*Barker, supra,* 407 U.S. at p. 531.) "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." (*Ibid.*, fn. omitted.) As explained *ante*, the superior court properly found that the prosecution did not abuse the process when it sought to consolidate the matters, and there was abundant good cause to grant the continuances based on the representations from codefendant's Harris's two attorneys that they were not ready for trial at the relevant times.

The third factor, the defendant's assertion of his right, weighs in defendant's favor, since he explicitly asserted his right to a speedy trial beginning on December 14, 2009. (*Barker, supra,* 407 U.S. at pp. 531-532.)

However, the fourth factor, the prejudice to the defendant, clearly weighs against him. This factor is assessed in light of the interests a speedy trial was designed to protect: preventing "oppressive" pretrial incarceration, minimizing "anxiety and concern of the

accused," and "limit[ing] the possibility that the defense will be impaired." (*Barker, supra,* 407 U.S. at p. 532, fn. omitted.) Whether the defense is impaired is the most serious consideration for this final factor. (*Ibid.*) As explained *ante,* defendant never made any showing of prejudice, oppressing pretrial incarceration, or that the defense was impaired by the six-month delay in this case. More importantly, defendant actually received a benefit given the prosecution's ultimate decision to withdraw its opposition to his repeated motions for severance, and he was tried by himself only for the barbershop robberies and carjacking.

Balancing these factors, we conclude defendant's constitutional right to a speedy trial was not violated.

II. DENIAL OF DEFENDANT'S REQUEST TO BIFURCATE GANG EVIDENCE

As set forth in section I, *post,* the prosecution repeatedly sought to consolidate the barbershop robberies with the home invasion/murder case. The prosecution eventually elected to separately try defendant by himself for the barbershop robberies and carjacking. In this case, defendant was thus separately tried for count V, carjacking of Mosley's vehicle, counts VI through IX, robbery of the four men in the barbershop; and count XI, the substantive gang offense. As to counts VI through IX, it was alleged that defendant committed the robberies and carjacking for the benefit of the ESC.

We now turn to the issues which arose when defendant was separately tried for these offenses.

Defendant argues the court abused its discretion when it denied his request to bifurcate evidence as to the gang issues, and that admission of the gang evidence during the prosecution's case on the robbery and carjacking charges was grossly unfair and violated his due process rights. In the alternative, defendant argues defense counsel was prejudicially ineffective if he failed to make the appropriate motion to preserve review of this issue.

A. Motions in limine

During the pretrial motions in limine for defendant's jury trial, defendant moved to bifurcate the gang issues and dismiss gang allegations. Defendant's motion was based on the prosecution's alleged failure to disclose exculpatory evidence in violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), the issue of admissibility of the gang expert's testimony, and the sufficiency of the evidence for the gang allegations to go to trial. Defendant did not move to sever count XI, the gang substantive offense charged against him, from counts V through X, the carjacking and robbery charges.

In opposition, the prosecution argued the gang enhancements should not be bifurcated because defendant was also charged with the gang substantive offense. The prosecution further argued the gang evidence was intertwined with the other charged offenses based on the theory that defendant's gang membership motivated him to commit the barbershop robberies with another gang member, the reluctance of witnesses to cooperate and testify, and the identification of defendant based on his gang moniker.

B. The court's ruling

Prior to trial, the court heard argument on defendant's motion in limine and defendant's *Brady* allegations. Defendant did not address bifurcation. However, the prosecution argued the gang allegations should not be bifurcated for the reasons stated in its opposition.

The court denied defendant's motion in limine as to the *Brady* allegations, the admission of the gang expert's opinion, and the sufficiency of the evidence to go to trial. In ruling on another defense motion, however, the court addressed both bifurcation and severance as to the gang evidence:

> "The gang evidence being proferred is relevant in this case to prove I.D. and motive and intent, and then we have a charge in count 11 of [section] 186.22(A), and there is no reason to sever that charge from the other charges. The evidence it does [*sic*] to an issue certainly of efficiency, and the cumulative aspect has been addressed. [¶] So we have both gang

> enhancement allegations and a charged offense relying upon for the most part, the same evidence and gang allegations are inextricably intertwined with the counts alleged, and the gang evidence may to some extent come in on issues of credibility; but we won't know until we hear from witnesses."

C. Motion for new trial

As part of defendant's motion for new trial, he argued there was insufficient evidence to support his conviction on count XI, the gang substantive offense, and the jury's findings on the gang enhancements. He also argued the gang expert's opinions were speculative. He did not argue the court should have granted motions for bifurcation and/or severance of the gang issues. The court denied the motion for new trial.

D. Forfeiture

As a preliminary matter, the parties dispute whether defendant moved to bifurcate or sever the gang issues in this case or raised the issue in his new trial motion. The People assert that while defendant's pretrial motion included bifurcation in the title, the defendant never moved to bifurcate the gang evidence or sever count IX, the substantive gang offense, he never raised these issues in his new trial motion, and he has forfeited appellate review of both issues. Defendant insists he preserved all issues.

Defendant's pretrial and new trial motions did not raise the specific issues which he now raises on appeal. During the pretrial rulings, however, the superior court clearly believed that both bifurcation and severance of the gang issues had been raised, and addressed both issues. Thus, we will address the court's rulings on those two issues.

E. Bifurcation

A trial court has broad discretion to control the conduct of a criminal trial. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*).) The court's power to bifurcate the trial of a gang enhancement from the trial of the substantive offense is implied in section 1044. (*Hernandez, supra*, 33 Cal.4th at p. 1048.)

Hernandez explained that the need to bifurcate gang allegations is often not as compelling as the bifurcation of prior conviction evidence. (*Hernandez*, *supra*, 33

Cal.4th at pp. 1048-1049.) "A prior conviction allegation relates to the defendant's *status* and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense. So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation. [Citation.]" (*Id.* at p. 1048, italics in original.) While the Legislature has "recognized the potential for prejudice when a jury deciding guilt hears of a prior conviction … [n]othing in section 186.22 suggests the street gang enhancement should receive special treatment of the kind given prior convictions. [Citations.]" (*Id.* at p. 1049.)

"[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Hernandez, supra,* 33 Cal.4th at pp. 1049-1050.)

In moving for bifurcation, the defense " 'must clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.]" (*Hernandez, supra,* 33 Cal.4th at p. 1051.) Bifurcation may be necessary where the predicate offenses offered to establish the pattern of criminal activity are "unduly prejudicial," or where some of the other gang evidence may be "so extraordinarily prejudicial, and of so little relevance to guilt," that it may influence the jury to convict regardless of the defendant's guilt. (*Id.* at p. 1049.)

We review the trial court's denial of a motion to bifurcate for abuse of discretion. (*Hernandez, supra*, 33 Cal.4th at p. 1048.) The trial court's discretion to deny a motion

to bifurcate the trial of a charged gang enhancement is broader than its discretion to admit gang evidence when a gang enhancement is not charged. (*Id.* at p. 1050.) When the evidence sought to be severed is related to a charged offense, the burden is on the defendant to clearly establish a substantial danger of prejudice requiring bifurcation. (*Ibid.*)

1. *Analysis*

The trial court did not abuse its discretion when it denied bifurcation of the gang allegations and evidence in this case. The gang evidence was necessarily intertwined with the charged offenses as to several relevant issues, particularly motive and identity. "Motive is always relevant in a criminal prosecution." (*People v. Perez* (1974) 42 Cal.App.3d 760, 767.) "Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. [Citation.] ' "[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." [Citations.]' [Citations.]" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168 (*Samaniego*).)

Defendant and Harris were members of the ESC, they were alleged to have committed the barbershop armed robberies and carjacking together, they committed the offenses in the traditional territory of the ESC, the stolen car was found within ESC territory, they fled to a particular street routinely frequented by members of the ESC, and several of the stolen items were found in an apartment located in the ESC area. In addition, some of the witnesses identified one of the robbery suspects by the nickname of "A-Loc," defendant's gang moniker.

F. Severance

In addition, defendant was charged with count XI, the substantive gang offense, based on his robbery and carjacking in this case. As relevant to the charges in this case, "to entirely eliminate the gang evidence would have required a severance ... of the street

terrorism count and the bifurcation of the gang enhancements." (*People v. Burnell* (2005) 132 Cal.App.4th 938, 947.)

"In the context of severing charged offenses, we have explained that 'additional factors favor joinder. Trial of the counts together ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.' [Citation.] Accordingly, when the evidence sought to be severed relates to a charged offense, the 'burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. [Citations.] When the offenses are joined for trial the defendant's guilt of all the offenses is at issue and the problem of confusing the jury with collateral matters does not arise. The other-crimes evidence does not relate to [an] offense for which the defendant may have escaped punishment. That the evidence would otherwise be inadmissible may be considered as a factor suggesting possible prejudice, but countervailing considerations that are not present when evidence of uncharged offenses is offered must be weighed in ruling on a severance motion. The burden is on the defendant therefore to persuade the court that these countervailing considerations are outweighed by a substantial danger of undue prejudice.' [Citation.]" (*Hernandez*, *supra*, 33 Cal.4th at p. 1050.)

As with bifurcation, the court's ruling on a severance motion is reviewed for abuse of discretion. (*People v. Marshall* (1997) 15 Cal.4th 1, 27-28.) "Whether a trial court abused its discretion in denying a motion to sever necessarily depends upon the particular circumstances of each case. [Citations.] The pertinent factors are these: (1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is any one of the charges a death penalty offense, or does joinder of the charges convert the matter

into a capital case. [Citation.] A determination that the evidence was cross-admissible ordinarily dispels any inference of prejudice. [Citations.]" (*Ibid*.)

"The analogy between bifurcation and severance is not perfect. Severance of charged offenses is a more inefficient use of judicial resources than bifurcation because severance requires selection of separate juries, and the severed charges would always have to be tried separately; a bifurcated trial is held before the same jury, and the gang enhancement would have to be tried only if the jury found the defendant guilty. But much of what we have said about severance is relevant here, *and we conclude that the trial court's discretion to deny bifurcation of a charged gang enhancement is similarly broader than its discretion to admit gang evidence when the gang enhancement is not charged*. [Citation.]" (*Hernandez*, *supra*, 33 Cal.4th at p. 1050, italics added.)

1. *Analysis*

To the extent defendant moved to sever count XI, the gang substantive offense, the court did not abuse its discretion to deny severance. Joint trials of offenses which occur together are legislatively preferred over separate trials, and the party requesting severance of properly joined offenses carries a very heavy burden to " '*clearly establish* that there is a substantial danger of prejudice requiring that the charges be separately tried' " before such a severance can be granted. (*People v. Burnell*, *supra*, 132 Cal.App.4th at p. 946, italics in original; see § 954.) Defendant failed to do so. The gang evidence was cross-admissible as to motive, identity, and the reluctance of certain witnesses to testify. The substantive street terrorism count required much the same evidence to prove, and was no more potentially inflammatory than the other charges, such that severance would not have been appropriate. (See, e.g., *Hernandez*, *supra*, 33 Cal.4th at p. 1051.) In addition, the evidence as to count XI, the substantive gang evidence, and the gang enhancements, was not weak. Indeed, as we will discuss in issue V, *post*, the evidence of the gang association, benefit, and motive in this case was particularly strong. And as we will discuss in issue IV, *post*, the jury was correctly instructed on the limited purpose of gang

evidence, and we presume the jury followed the instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

G. Due process

Finally, defendant argues the denial of his motions for bifurcation and/or severance of the gang issues and evidence violated his due process right to a fair trial on the carjacking and robbery charges, because of the alleged "gross unfairness" that resulted from the introduction of the gang evidence in this case.

Defendant's argument is based on *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*), which held:

> "To prove a deprivation of federal due process rights, [the defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. 'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.] 'The dispositive issue is ... whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citations.]' [Citation.]" (*Id*. at pp. 229-230, fn. omitted.)

In *Albarran*, the defendant was charged with multiple offenses based on his participation in a shooting at the victim's home. He was not charged with the gang substantive offense, but gang enhancements were alleged. (*Albarran*, *supra*, 149 Cal.App.4th at pp. 217-220.) The trial court permitted the prosecution to introduce gang evidence to prove defendant's motive and intent. The jury convicted the defendant of the substantive offenses and found the gang enhancements were true. Thereafter, the court granted a motion to dismiss the gang allegations for insufficient evidence. (*Id.* at pp. 218-220.)

Albarran held that while the trial court may have initially found that defendant's gang activities were relevant and probative to his motive and intent, the court abused its

discretion when it permitted the prosecution to introduce additional gang evidence that was completely irrelevant to defendant's motive or the substantive criminal charges. (*Albarran, supra,* 149 Cal.App.4th at p. 217.) The irrelevant evidence included other gang members' threats to kill police officers, descriptions of crimes committed by other gang members and references to the Mexican Mafia prison gang. *Albarran* characterized the irrelevant gang evidence as "extremely and uniquely inflammatory, such that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues." (*Id.* at p. 230, fns. omitted.) *Albarran* also classified this evidence as "overkill," and said it was "troubled" by the trial court's failure to scrutinize the potential prejudice of the gang offense on the substantive charges. (*Id.* at p. 228.) *Albarran* found the irrelevant and prejudicial gang evidence was so inflammatory that it "had no legitimate purpose in this trial," and held admission of that evidence violated defendant's due process rights. (*Id.* at pp. 230-231.)

1. *Analysis*

The instant case is not "one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Albarran, supra,* 149 Cal.App.4th at p. 232.) In contrast to *Albarran*, defendant was charged with both the gang substantive offense and enhancements. The court did not grant a new trial as to either count XI or the enhancements. As we will explain *post*, the jury was properly instructed on the limited admissibility of the gang evidence, and the jury's findings on count XI and the gang enhancements are supported by overwhelming substantial evidence. More importantly, Officer Finney's expert testimony regarding the criminal activities of the ESC was not similar to the sensational and prejudicial testimony admitted in *Albarran*. While Finney addressed predicate offenses committed by other members of ESC, his testimony was limited to the essential facts needed by the prosecution to prove the elements of both the gang substantive offense and the enhancements. In addition, Finney never addressed any

prior criminal conduct allegedly committed by defendant and/or Harris. Moreover, the gang evidence in this case was no more sensational than the evidence as to the carjacking and robbery charges against defendant, that he committed a brazen daytime armed robbery, during which one of the suspects trained his firearm on one of the victims and repeatedly threatened to "pop" him if he failed to quickly remove his jewelry.

The court did not abuse its discretion when it denied bifurcation and severance of the gang issues and evidence in this case, and the admission of the gang evidence did not violate defendant's due process rights.

III. ADMISSION OF OFFICER FINNEY'S TESTIMONY

Defendant argues that the court improperly permitted Officer Finney, the prosecution's gang expert, to answer a series of hypothetical questions which mirrored the facts in this case. Defendant argues Finney was improperly permitted to respond to "unduly case-and defendant-specific gang hypothetical questions and answers" which effectively told the jurors how to decide the disputed gang issues in this case.

A. Expert testimony in gang cases

It is well settled that expert testimony about gang culture and habits is admissible and the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation. (*People v. Gardeley* (1996) 14 Cal.4th 605, 619 (*Gardeley*); *People v. Valdez* (1997) 58 Cal.App.4th 494, 506; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) The subject matter of the culture and habits of street gangs meets the criteria for the admissibility of expert opinion because such evidence is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (*Gardeley, supra,* 14 Cal.4th at p. 617.) Such areas include "testimony about the size, composition or existence of a gang [citations], gang turf or territory [citations], an individual defendant's membership in, or association with, a gang [citations], the primary activities of a specific gang [citations], motivation for a particular crime, generally retaliation or intimidation [citations], whether and how a crime was

committed to benefit or promote a gang [citations], rivalries between gangs [citation], gang-related tattoos, gang graffiti and hand signs [citations], and gang colors or attire [citations]." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657, fns. omitted.)

"A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter ... upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." (Evid. Code, § 802.) Expert testimony may be "premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions" and is reliable. (*Gardeley, supra,* 14 Cal.4th at p. 618.) If the threshold requirement of reliability is met, "even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony." (*Ibid.*, italics omitted; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463.) Since Evidence Code section 802 permits an expert witness to " 'state on direct examination the reasons for his opinion and the matter ... upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*Gardeley, supra,* 14 Cal.4th at p. 618.)

Thus, an officer testifying as a gang expert, just like other experts, may give testimony that is based on hearsay, including conversations with gang members as well as with the defendant. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *Gardeley, supra,* 14 Cal.4th at p. 620; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9.) A gang expert's opinion may also be based upon the expert's personal investigation of past crimes by gang members, and information about gangs learned from the expert's colleagues or other law enforcement agencies. (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 324; *Gardeley, supra,* 14 Cal.4th at p. 620; *People v. Vy, supra,* 122 Cal.App.4th at p. 1223, fn. 9.)

B. *People v. Vang*

"A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence. [Citation.]" (*People v. Gonzales* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.)

At the time of briefing in this case, defendant acknowledged the question of the permissible degree of specificity in gang hypothetical questions was pending before the California Supreme Court. This issue has now been decided. In *People v. Xue Vang* (2011) 52 Cal.4th 1038 (*Vang*), it was alleged the defendants committed felony assault with force likely to commit great bodily injury for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1). (*Vang, supra*, 52 Cal.4th at pp. 1041-1042.) The prosecutor presented expert testimony with respect to the history, characteristics and motives of the gang. The prosecutor also asked the expert hypothetical questions which "closely tracked the evidence in a manner that was only thinly disguised." (*Id*. at p. 1041.) The appellate court reversed and held the trial court erroneously allowed the expert to respond to the hypothetical questions. (*Ibid*.)

Vang held that the hypothetical questions, and their recitation of the evidence against the defendants, were a proper means of presenting the expert's opinions.

> "Use of hypothetical questions is subject to an important requirement. 'Such a hypothetical question must be rooted in facts shown by the evidence....' [Citations.] A hypothetical question need not encompass all of the evidence. 'It is true that "it is not necessary that the question include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question." [Citation.] On the other hand, the expert's opinion may not be based ' "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors...." ' [Citations.] But, however much latitude a party has to frame hypothetical questions, the

questions must be rooted in the evidence of the case being tried, not some other case.

"The reason for this rule should be apparent. A hypothetical question not based on the evidence is irrelevant and of no help to the jury. ' "Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?" ' [Citation.] Expert testimony *not* based on the evidence will not assist the trier of fact. Thus, '[a]lthough the field of permissible hypothetical questions is broad, a party cannot use this method of questioning a witness to place before the jury facts divorced from the actual evidence and for which no evidence is ever introduced.' [Citation.]

"As applied here, this rule means that the prosecutor's hypothetical questions had to be based on what the evidence showed *these* defendants did, not what someone else might have done. The questions were directed to helping the jury determine whether *these* defendants, not someone else, committed a crime for a gang purpose. Disguising this fact would only have confused the jury." (*Vang*, *supra*, 52 Cal.4th at p. 1045, italics in original.)

Vang held that hypothetical questions could properly be used to elicit testimony from gang experts, and that such questions "must be rooted in the evidence of the case being tried, not some other case." (*Vang*, *supra*, 52 Cal.4th at p. 1046.) The court specifically approved the prosecutor's use of hypothetical questions even though the questions only " 'thinly disguised' " the evidence. (*Id.* at p. 1046.)

Although approving an expert's express reliance on and consideration of the evidence presented at trial, *Vang* nonetheless carefully reiterated and reaffirmed the rule which prevents an expert from offering an opinion as to a defendant's actual guilt or the actual truth of an alleged enhancement. " 'A witness may not express an opinion on a defendant's guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimonyoften goes to the ultimate issue. [Citations.] "Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as

the witness to weigh the evidence and draw a conclusion on the issue of guilt." ' [Citations.]" (*Vang, supra*, 52 Cal.4th at p. 1048.)

Vang noted the expert in that case had no personal knowledge as to whether any of the defendants had committed the underlying assault "and if so, how or why; he was not at the scene. The jury was as competent as the expert to weigh the evidence and determine what the facts were, including whether the defendants committed the assault. So he could not testify directly whether they committed the assault for gang purposes. *But he properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose*." (*Vang, supra*, 52 Cal.4th at p. 1048, italics added.)

Vang further held that hypothetical questions which closely track evidence presented at trial and are, as a practical matter, indistinguishable from the case presented against a defendant, are quite distinct from direct opinions about a defendant's guilt or innocence. (*Vang, supra,* 52 Cal.4th at p. 1049.) Unlike questions of guilt or innocence, hypothetical questions do not invade the province of the jury:

> "[E]xpect testimony is permitted even if it embraces the ultimate issue to be decided. [Citation.] The jury still plays a critical role in two respects. First, [the jury] must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Id.* at pp. 1049-1050.)

C. <u>Analysis</u>

Vang resolves defendant's challenges to the hypothetical questions asked in this case. As set forth in the factual summary, *ante*, the prosecutor asked Officer Finney, the prosecution's gang expert, several hypothetical questions. As in *Vang*, these questions were based on hypothetical situations nearly identical to the crimes which occurred in this case, but the use of such questions did not invade the province of the jury. In addition, while the prosecutor attempted to ask Finney specific questions about the

culpability of defendant and/or Harris, the court sustained defense counsel's objections to those questions and Finney never addressed the issue. Thus, Finney's responses to the hypothetical questions did not stray from the guidelines for such questions approved in *Vang*.

IV. INSTRUCTIONS ON LIMITATIONS OF GANG EVIDENCE

Defendant challenges the instructions regarding the jury's consideration of the gang evidence, and contends these instructions overstated and erroneously defined the extent to which the jury could rely on the gang evidence to convict him of the substantive offenses.

" 'It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.] "[T]he fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial." [Citation.] "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." [Citation.]' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 328.)[9]

A. Background

The jury received several instructions regarding the limited purpose and consideration of the gang evidence and the expert's testimony on that topic.

CALCRIM No. 303 stated:

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[9] Defendant raises a series of instructional issues on appeal. He failed to object to or raise any of these same instructional challenges during trial. Defendant asserts that he has not forfeited review of these issues since the alleged instructional errors affected his substantial rights. In the alternative, he claims that his defense attorney's failure to object to these issues constitutes prejudicial ineffective assistance. Defendant is correct that an instructional error that affects the defendant's substantial rights may be reviewed on appeal despite the absence of an objection. (§ 1259; *People v. Prieto* (2003) 30 Cal.4th 226, 247; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) We will therefore address the merits of his various instructional challenges.

"During the trial, certain evidence was admitted for limited purpose. You may consider that evidence only for that purpose and for no other."

CALCRIM No. 332 addressed the testimony of an expert witness:

"Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide.

"In evaluating the beliveability of an expert witness, follow the instructions about the believability of witnesses generally.

"In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion.

"You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

"An expert witness may be asked a hypothetical question. The hypothetical question asked the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved.

"If you conclude that an assumed fact is not true, consider the affect of the expert's reliance on that fact in evaluating the expert's opinion."

In CALCRIM No. 360, the jury was cautioned regarding the limited admissibility of Detective Finney's testimony about the statements made by Tierre Hester, Sr., that defendant was a member of ESC:

"Detective Josh Finney testified that, in reaching his conclusions as an expert witness, he considered statements by a Tierre Hester, Sr. You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statement or statements is true."

CALCRIM No. 1403, the limited admissibility of gang evidence, stated:

"You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with *the intent, purpose, and knowledge that are required to prove the gang-related crimes and*

> *enhancements charged, or the defendant had a motive to commit the crimes charged*. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his opinion. [¶] *You may not consider this evidence for any other purpose*. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crimes." (Italics added.)

B. Analysis

Defendant contends CALCRIM No. 1403 "grossly overstated" the purposes for which the gang evidence could be considered in this case, and "grossly fails to specify and segregate the various types of gang and other crimes evidence admitted for various purposes."

Given its inflammatory impact, "[g]ang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) "Thus, as [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative." (*Albarran, supra,* 149 Cal.App.4th at p. 223.) "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*Hernandez, supra,* 33 Cal.4th at p. 1049.)

The trial court "must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury." (*Albarran, supra,*149 Cal.App.4th at p. 224.) Despite its potential for prejudice, however, gang evidence "is not insulated from the general rule that all relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than probative,

and is not cumulative. [Citations.]" (*Samaniego, supra*, 172 Cal.App.4th at p. 1167.) "The People are entitled to 'introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent.' [Citation.]" (*People v. Gonzalez, supra*, 126 Cal.App.4th at p. 1550.) "Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. [Citation.]" (*Samaniego, supra*, 172 Cal.App.4th at pp. 1167-1168.) Gang evidence may also be relevant on the issue of a witness's credibility. (*Id*. at p. 1168.)

As given in this and other cases, including the language complained of by defendant, CALCRIM No. 1403 "is neither contrary to law nor misleading. It states in no uncertain terms that gang evidence is not admissible to show that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang enhancement, the motive for the crime and the credibility of witnesses." (*Samaniego, supra*, 172 Cal.App.4th at p. 1168.) In addition, CALCRIM No. 332 has also been approved regarding the limited admissibility of a gang expert's testimony. (*Vang, supra,* 52 Cal.4th at p. 1050.) The jury herein was correctly instructed on the limited admissibility of gang evidence.

Defendant also asserts the court had a sua sponte duty to give an additional limiting instruction, similar to former CALJIC No. 2.50.2, that the jury could not consider evidence of other gang crimes unless that evidence was proven by a preponderance of the evidence. CALJIC No. 2.50.2 defined the preponderance evidentiary standard. The preponderance standard is at the lowest end of the spectrum, and is more typical in civil than criminal cases. (*Addington v. Texas* (1979) 441 U.S. 418, 423.) A preponderance of the evidence standard of proof merely requires a finding that the fact to be proven is more likely than not. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 852.) The jury was instructed to consider the instructions as a whole (CALJIC No. 1.01). The instructions as a whole clearly indicated that the prosecution had the burden of proving the defendant guilty of all charged offenses

beyond a reasonable doubt. (CALCRIM No. 220.) Even assuming the trial court had a sua sponte duty to provide the jurors with a definition of "preponderance of the evidence," it is not reasonably likely the jury misunderstood the instructions in the manner suggested by defendant. (See *People v. Clair* (1992) 2 Cal.4th 629, 662-663.)

Defendant asserts that CALCRIM No. 360, about the limited consideration of Hester's statements to Detective Finney, was inconsistent with CALCRIM No. 332, about the consideration of the expert's opinion testimony. This argument is also meritless based on the entirety of the instructions. The jury was instructed about the limited purpose of certain evidence (CALCRIM No. 303), and it could not consider Hester's statements to Finney as proof that the information contained in the statement or statements is true. (CALCRIM No. 360)

V. SUBSTANTIAL EVIDENCE OF GANG SUBSTANTIVE OFFENSE AND GANG ENHANCEMENTS

Defendant contends his conviction in count XI for the gang substantive offense must be reversed (§ 186.22, subd. (a)), and the gang enhancements found true as to the carjacking and robbery counts must be stricken (§ 186.22, subd. (b)), because there is insufficient evidence to support these findings. Defendant argues that evidence of his gang membership was insufficient to support either count XI or the gang enhancements, and the evidence showed that he could have committed the offenses for a personal reason.

A. Substantial evidence

In assessing the sufficiency of the evidence to support a conviction, "we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]"

(*People v. Bolin*, *supra*, 18 Cal.4th at p. 331; *People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

The same substantial evidence standard applies when reviewing a jury's true finding on gang enhancements. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).)

It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation. (*People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1047-1048; *People v. Valdez*, *supra*, 58 Cal.App.4th at p. 506; *People v. Ferraez*, *supra*, 112 Cal.App.4th at p. 930.) "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of ... a[ ] criminal street gang' within the meaning of section 186.22(b)(1). [Citations.]" (*Albillar*, *supra*, 51 Cal.4th at p. 63.) The credibility and weight of expert testimony is for the trier of fact to determine. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466-467.)

B. <u>The gang substantive offense</u>

In count XI, defendant was convicted of the gang substantive offense in violation of section 186.22, subdivision (a), which states that "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in *any felonious criminal conduct* by members of that gang, shall be punished by imprisonment ...." (§ 186.22, subd. (a), italics added.)

Defendant contends his conviction for the substantive gang offense is not supported by any substantial evidence that he had the personal intent to benefit the ESC when he committed the carjacking and robberies in this case. However, these identical challenges to section 186.22, subdivision (a) were considered and rejected in *Albillar*. In that case, three defendants took turns raping the victim while the others either assisted or

stood nearby. Defendants were related to each other, and they were also members of the Southside Chiques gang. (*Albillar*, *supra*, 51 Cal.4th at pp. 52-53.) They were convicted of forcible rape in concert, forcible sexual penetration in concert, and the gang substantive offense, and were found to have committed the offenses for the benefit of a criminal street gang. (*Id.* at p. 50.)

Albillar clarified that "a violation of section 186.22(a) is established when a defendant actively participates in a criminal street gang with knowledge that the gang's members engage or have engaged in a pattern of criminal activity, and willfully promotes, furthers, or assists in *any felonious criminal conduct* by gang members." (*Albillar*, *supra*, 51 Cal.4th at p. 54, italics in original.) *Albillar* rejected the defendants' challenges to their convictions for the substantive gang offense, based on their argument that the phrase "any felonious criminal conduct," in section 186.22, subdivision (a), referred only to gang-related felonious criminal conduct. (*Albillar*, *supra*, 51 Cal.4th at p. 59.)

> "The gravamen of the substantive offense set forth in section 186.22(a) is active participation in a criminal street gang. [T]he phrase 'actively participates' reflects the Legislature's recognition that criminal liability attaching to membership in a criminal organization must be founded on concepts of personal guilt required by due process: 'a person convicted for active membership in a criminal organization must entertain "guilty knowledge and intent" of the organization's criminal purposes.' [Citation.] Accordingly, the Legislature determined that the elements of the gang offense are (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.] *All three elements can be satisfied without proof the felonious criminal conduct promoted, furthered, or assisted was gang related.*" (*Albillar*, *supra*, 51 Cal.4th at pp. 55-56, italics added.)

The "plain language" of section 186.22, subdivision (a) "thus targets felonious criminal conduct, not felonious gang-related conduct." (*Albillar, supra,* 51 Cal.4th at p. 55.)

> "[T]here is nothing absurd in targeting the scourge of gang members committing *any* crimes together and not merely those that are gang related. Gang members tend to protect and avenge their associates. Crimes committed by gang members, whether or not they are gang related or committed for the benefit of the gang, thus pose dangers to the public and difficulties for law enforcement not generally present when a crime is committed by someone with no gang affiliation. 'These activities, both individually and collectively, present a clear and present danger to public order and safety....' [Citation.]" (*Albillar, supra,* 51 Cal.4th at p. 55.)

Albillar thus concluded that the defendants' convictions for the substantive gang offense were supported by substantial evidence, and their challenges were without merit, because the phrase "any felonious criminal conduct" in section 186.22, subdivision (a), was not limited to gang-related felonious conduct. (*Albillar, supra,* 51 Cal.4th at p. 59.)

1. *Analysis*

In the instant case, as in *Albillar*, we similarly conclude that defendant's substantial evidence challenges to his conviction in count XI, the substantive gang offense, are without merit. In order to establish a violation of section 186.22, subdivision (a), the prosecution was not required to prove the felonious criminal conduct which defendant promoted, furthered, or assisted during the barbershop robberies was gang related.

C. The gang enhancements

Defendant contends the jury's findings on the gang enhancements are not supported by substantial evidence that he "specifically harbored the requisite intent" when he committed the underlying offenses. Defendant argues that evidence of his gang membership, standing alone, was insufficient to establish that the underlying offenses were gang related.

As to count V, carjacking, and counts VI through IX, robbery, the jury found true the gang enhancements pursuant to section 186.22, subdivision (b). To establish a gang enhancement, the prosecution must prove two elements: (1) that the crime was "committed for the benefit of, at the direction of, *or* in association with any criminal street gang," and (2) that the defendant had "the specific intent to promote, further, or assist in any criminal conduct by gang members ...." (§ 186.22, subd. (b)(1), italics added.)

As to the first element, "[n]ot every crime committed by gang members is related to a gang." (*Albillar, supra,* 51 Cal.4th at p. 60.) However, *Albillar* acknowledged that the gang-related requirement for the enhancement may be shown by evidence indicating that several defendants "came together as gang members" to commit the offense, or that the offense could benefit the gang by, for example, elevating the gang's or gang members' status or advancing the gang's activities. (*Albillar, supra,* 51 Cal.4th at pp. 62-63, italics omitted; see *Gardeley, supra,* 14 Cal.4th at p. 619.) If the evidence is sufficient to establish the crime was committed in association with a gang, the prosecution need not prove that it was committed for the benefit of or at the direction of a gang. (See, e.g., *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*).)

As for the second element of specific intent, it does not require "that the defendant act with the specific intent to promote, further, or assist a *gang*; the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members*." (*Albillar, supra*, 51 Cal.4th at p. 67, italics in original.) "[S]pecific intent to *benefit* the gang is not required." (*Morales, supra,* 112 Cal.App.4th at p. 1198, italics in original.) The specific intent element "applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*Albillar, supra*, 51 Cal.4th at p. 66, italics in original.) The scienter requirement is "the specific intent to promote, further, or assist in *any* criminal conduct by gang members—including the current offenses—and not merely

other criminal conduct by gang members." (*Albillar*, *supra*, 51 Cal.4th at p. 65, italics in original.)

"[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar*, *supra*, 51 Cal.4th at p. 68.) "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. [Citation.]" (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.)

In *Albillar*, the California Supreme Court addressed defendants' substantial evidence challenge to the gang enhancements found true as to the sexual assault offenses in that case. Defendants argued the sexual assaults were not "gang-related" because the defendants were related to each other, they lived together, and it was conceivable that " 'several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang.' [Citation.]" (*Albillar*, *supra*, 51 Cal.4th at pp. 59-60, 62.)

Albillar rejected defendants' arguments and found there was substantial evidence to support the gang enhancements for two reasons: the offenses were committed in association with gang members, and the offenses were committed for the benefit of the gang. (*Albillar*, *supra*, 51 Cal.4th at p. 60.) "The record supported a finding that [the] defendants relied on their common gang membership and the apparatus of the gang in committing the sex offenses against [the victim]." (*Ibid.*) In particular, the court cited expert testimony about how gang members earn respect and status by committing crimes with other members, and that gang members choose to commit crimes together in order to increase their chances of success and to provide training for younger members. (*Id.* at pp. 60-61.)

Albillar concluded that defendants' conduct, where each participant assisted the others without a word being spoken, and each could rely on the silence of the others and group intimidation of the victim, "exceeded that which was necessary to establish that the offenses were committed in concert." (*Albillar, supra,* 51 Cal.4th at p. 61.)

> "Defendants not only actively assisted each other in committing these crimes, but their common gang membership ensured that they could rely on each other's cooperation in committing these crimes and that they would benefit from committing them together. They relied on the gang's internal code to ensure that none of them would cooperate with the police and on the gang's reputation to ensure that the victim did not contact the police." (*Id.* at pp. 61-62.)

Albillar also found substantial evidence the crimes were committed to benefit the gang. (*Albillar, supra,* 51 Cal.4th at p. 63.) The court cited the gang expert's testimony, that " '[w]hen three gang members go out and commit a violent brutal attack on a victim, that's elevating their individual status, and they're receiving a benefit. They're putting notches in their reputation. When these members are doing that, the overall entity benefits and strengthens as a result of it.' Reports of such conduct 'rais[e] the[ ] level of fear and intimidation in the community.' " (*Ibid.*) *Albillar* explained:

> "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of ... a[ ] criminal street gang' within the meaning of section 186.22[, subd.] (b)(1)." (*Ibid.*)

1. *Analysis*

As in *Albillar,* defendant similarly argues that there is insufficient evidence to support the gang enhancements in this case when someone who happens to be a gang member commits felonious offenses for personal reasons. Defendant acknowledges the holding in *Albillar,* but argues there is no evidence that the underlying offenses in this case were committed with the requisite specific intent, or for the benefit of, at the direction of, or in association with the ESC. Defendant further argues Officer Finney's "bare speculation" was insufficient to satisfy these elements of the gang enhancement.

Defendant's attack on Officer Finney's expert opinion as bare speculation is meritless. Finney testified to his extensive personal experience investigating the criminal activities of the ESC and interviewing their members. As explained in *Vang*, the prosecutor's hypothetical questions were appropriate. In addition, the questions were rooted in the facts shown by the evidence and were not based on " 'assumptions of fact without evidentiary support ….' " (*People v. Richardson* (2008) 43 Cal.4th 959, 1008.)

As to the first element of the enhancement, the jury could have reasonably inferred the carjacking and robberies in this case were gang-related from the very fact that defendant committed the charged crimes in association with a fellow gang member. (*Morales*, *supra*, 112 Cal.App.4th at p. 1198; *Albillar*, *supra*, 51 Cal.4th at p. 62.) "The crucial element [of a gang allegation] requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in *association* with a gang. Thus, the typical close case is one in which one gang member, acting alone, commits a crime." (*Morales*, *supra*, 112 Cal.App.4th at p. 1198.)

This is not a close case, given the overwhelming evidence that defendant and Harris were members of the ESC when they committed the barbershop robberies and carjacking together. Active participation is defined as "involvement with a criminal street gang that is more than nominal or passive." (*People v. Castaneda* (2000) 23 Cal.4th 743, 747.) It does not require that a person " 'devote all, or a substantial part of his time and efforts' to the gang. [Citation.]" (*Id.* at p. 752.) Officer Finney testified in extensive detail, and without contradiction, that defendant and Harris were both members and active participants in the criminal activities of the ESC and its related subsets.

As acknowledged by *Albillar*, not every crime committed by gang members is gang-related for purposes of section 186.22, subdivision (b), and the mere fact that gang members commit a crime together does not necessarily mean the crime is gang-related for purposes of the gang enhancement. (*Albillar*, *supra*, 51 Cal.4th at pp. 60, 62.) As *Albillar* also acknowledged, however, there was substantial evidence to support the gang

enhancements because the three defendants in that case "came together as gang members to attack [the victim] and, thus … they committed [the sexual assaults] in association with the gang." (*Id*. at p. 62.) In this case, defendant and Harris similarly came together in ESC territory to commit a carjacking and multiple robberies, offenses which Officer Finney identified as within the primary activities of the ESC, and which would promote fear of the gang in the territory.

Thus, the crimes were committed in association with the gang because the record supporting a finding that defendant and Harris "relied on their common gang membership and the apparatus of the gang in committing the [crimes] against [the victims]." (*Albillar, supra*, 51 Cal.4th at p. 60.) In addition, the crimes were committed for the benefit of the gang because, as explained by Officer Finney, the armed robberies, in the midst of gang territory, promoted fear of the gang. (*Albillar, supra*, 51 Cal.4th at p. 63.)

As for the second element of the enhancement, based on the evidence that defendant "intended to and did commit the charged felon[ies] with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar, supra*, 51 Cal.4th at p. 68.) Defendant and Harris committed the carjacking and robberies together, in a barbershop that was within the turf of the ESC. By their own admissions, they were actively associated with the ESC and its subsets. When they stole the car, they drove straight into the heart of ESC territory, abandoned the stolen vehicle, and fled to an apartment building which had long been associated with other members of the ESC. When Winters picked them up, they told her to drive into another section of ESC turf.

We thus conclude there is substantial evidence to support defendant's conviction in count XI for the substantive gang offense, and the gang enhancements found true as to the carjacking and robbery counts.[10]

VI. FAILURE TO DEFINE "IN ASSOCIATION WITH" AS TO GANG ENHANCEMENT

Defendant next contends the court had a sua sponte duty to further define the phrase "in association with" as to the gang enhancement, and asserts the phrase included technical terms which the jury could not understand without additional definitions.

A. Background

The jury was instructed with CALCRIM No. 1401 as to the elements of the gang enhancement. The jury was instructed that one of the elements was that the defendant committed the underlying offense "for the benefit of, at the direction of, *or in association with* a criminal street gang." (Italics added.) However, the court did not define the phrase "in association with," and defendant did not request additional instructions.

B. Analysis

Defendant argues that the court had a sua sponte duty to define "in association with" in CALCRIM No. 1401, because *Albillar* allegedly "loosen[ed] the definition of gang intent," and the court's sua sponte duty derives from "[t]he majority opinion in *Albillar*, as well as Justice Werdegar's concurrence [in *Albillar*], [which] confirm the 'in association' element is indeed a technical term susceptible of misunderstanding and misuse …."

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[10] We note that throughout the briefing in this case, defendant cites to *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1069, and *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1065, in support of his challenges to the gang findings and the instructions given in this case. *Albillar* rejected the Ninth Circuit's interpretation of the gang offense and gang enhancement contained in those cases. (*Albillar, supra,* 51 Cal.4th at p. 66.)

Defendant's argument misconstrues *Albillar,* which did not give a technical, legal meaning to the statutory language of section 186.22, subdivision (b). In her separate opinion in *Albillar*, Justice Werdegar only concurred as to the majority's discussion of section 186.22, subdivision (a)'s substantive gang offense. However, she strongly dissented as to the majority opinion's conclusion that the gang enhancement in that case was supported by substantial evidence as to the "benefit" and "association" elements, particularly the majority opinion's primary reliance on the expert's opinion to provide that substantial evidence. (*Albillar, supra,* 51 Cal.4th at pp. 68, 70-73 (conc. & dis. opn by Werdegar, J.).) The dissent also took strong exception to the majority opinion's definition of "in association with," and declared it rendered the language of section 186.22, subdivision (b) redundant. (*Id*. at pp. 73-74.) The dissent concluded the jury's findings on the gang enhancements should be reversed because it "necessarily relied on the construction of the phrase provided by the prosecutor, a construction neither consistent with the statute nor endorsed by the majority." (*Id*. at p. 74.)

Justice Werdegar did not advocate a specific definition for "in association with," but criticized the majority opinion for reliance on the expert's opinion to provide substantial evidence in light of the prosecutor's purported erroneous definition of the phrase.

In any event, defendant has failed to show that the statutory language, "committed for the benefit of, at the direction of, or in association with any criminal street gang" (§ 186.22, subd. (b)(1)) has a definition that differs from its nonlegal meaning. (*People v. Estrada* (1995) 11 Cal.4th 568, 574-575; *People v. Poggi* (1988) 45 Cal.3d 306, 327.) Indeed, Justice Werdegar's dissent cited to a definition of "associate" from the "Merriam–Webster's Eleventh Collegiate Dictionary (2004)." (*Albillar, supra*, 51 Cal.4th. at p. 70, fn. 2 (dis. & conc. opn. of Werdegar, J.).) " 'When a word or phrase " 'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to

its meaning in the absence of a request.' " [Citations.]' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 670.) Therefore, having failed to request a clarifying instruction, defendants forfeited their objection. (*People v. Russell* (2010) 50 Cal.4th 1228, 1273; *People v. Jennings, supra,* 50 Cal.4th at p. 671.)

Even if the argument were preserved, we would not find any prejudice. (*People v. Gamache* (2010) 48 Cal.4th 347, 376 (*Gamache*); *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101.) Officer Finney explained at length what it meant to commit a crime in association with or for the benefit of a gang.

VII. INSTRUCTION ON THE "IMMEDIATE PRESENCE" ELEMENT OF CARJACKING

In count V, defendant was charged and convicted of carjacking Mosley's vehicle. (§ 215.) Defendant argues the court erroneously defined the "immediate presence" element of carjacking, because it only defined constructive possession instead of physical control.

A. Background

As set forth in the factual summary, Mosley, one of the customers in the barbershop, had parked his white Dodge Charger behind the business. After the two suspects had taken money and jewelry from the victims in the barbershop, one suspect yelled out and asked who was driving the Dodge Charger. Mosley responded that the car belonged to him. The taller man said, " 'Give me the keys.' " Mosley threw his keys on the floor. One of the suspects retrieved the keys and they left the business. McClary, another robbery victim, heard a car start and quickly accelerate. The Dodge was abandoned near the Feliz Drive apartment.

The jury was instructed with CALCRIM No. 1650 as to the elements of carjacking.

> "The defendant is charged in Count 5 with carjacking, in violation of Penal Code section 215. [¶] To prove that the defendant is guilty of this

crime, the People must prove that: [¶] 1. The defendant took a motor vehicle that was not his own; [¶] 2. *The vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger*; [¶] 3. The vehicle was taken against that person's will; [¶] 4. The defendant used force or fear to take the vehicle or to prevent that person from resisting; and [¶] 5. When the defendant used force or fear to take the vehicle, he intended to deprive the other person of possession of the vehicle either temporarily or permanently." (Italics added.)

The jury was further instructed:

"A vehicle is within a person's immediate presence *if it is sufficiently within its control so that he could keep possession of it if not prevented by force or fear*. (Italics added.)

Defendant did not object to these instructions or request further definitions.

B. Carjacking

Carjacking is defined as "the felonious taking of a motor vehicle in the possession of another, *from his or her person or immediate presence*, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, italics added.)

A vehicle is within a person's immediate presence for purposes of carjacking if it is sufficiently within his control so that he could retain possession of it if not prevented by force or fear. (*People v. Medina* (1995) 39 Cal.App.4th 643, 648 (*Medina*).) It is not necessary that the victim be physically present in the vehicle when the confrontation occurs. (*Id*. at p. 650; *People v. Gomez* (2011) 192 Cal.App.4th 609, 623.)

In *Medina*, the victim was lured into a motel room by an accomplice of the defendant. (*Medina, supra,* 39 Cal.App.4th at pp. 646, 651.) There, the defendant and accomplices bound the victim, took his car keys, then took his car. (*Id.* at pp. 646-647.) The defendant challenged his conviction for carjacking, arguing that "actual physical proximity of the victim to the vehicle is required." (*Id.* at p. 649.) *Medina* disagreed,

explaining that the "only reason [the victim] was not in the car when it was taken and this was not a 'classic' carjacking, was because he had been lured away from it by trick or device." (*Id.* at pp. 651-652.)

In *People v. Hoard* (2002) 103 Cal.App.4th 599 (*Hoard*), the defendant entered a jewelry store and ordered two employees to give him the keys to the jewelry cases and to the car belonging to Sarah Gibeson, one of the employees. (*Id.* at p. 602.) The employees complied and were then directed into a back room and bound. (*Ibid.*) The defendant took jewelry from the cases and Gibeson's car. (*Ibid.*) *Hoard* relied on *Medina* and affirmed the defendant's carjacking conviction:

> "In the present case, the elements of carjacking were established. Defendant took possession of Gibeson's car by threatening her and demanding her car keys. *Although she was not physically present in the parking lot when he drove the car away, she had been forced to relinquish her car keys. Otherwise, she could have kept possession and control of the keys and her car*. Although not the 'classic' carjacking scenario, it was a carjacking all the same." (*Hoard, supra,* 103 Cal.App.4th at p. 609, italics added, fn. omitted.)

In contrast, in *People v. Coleman* (2007) 146 Cal.App.4th 1363, the court reversed defendant's carjacking conviction based on slightly different facts. The owner of a glass shop drove his Chevrolet Silverado to the shop in the morning, put the keys to the Silverado in a back work area of the shop, then drove away in a truck he used in his business. (*Id.* at p. 1366.) While the owner was away, the defendant entered the shop, pointed a gun at the office manager, and told her to give him the keys to the Silverado. (*Ibid.*) The office manager walked to the back of the shop, grabbed the keys to the Silverado, and gave them to the defendant. (*Ibid.*) The defendant was convicted of robbery and carjacking. (*Id.* at pp. 1365, 1367, fn. 2.)

Coleman reversed the conviction for carjacking. Coleman acknowledged "that a carjacking may occur where neither the possessor nor the passenger is inside or adjacent to the vehicle," but held the circumstances in the case were "simply too far removed from

the type of conduct that [the carjacking statute] was designed to address." (*Coleman, supra,* 146 Cal.App.4th at p. 1373.) The office manager who gave the keys to defendant "was not within any physical proximity to the Silverado, the keys she relinquished were not her own, and there was no evidence that she had ever been or would be a driver of or passenger in the Silverado." (*Ibid.*)

In *People v. Gomez*, *supra*, 192 Cal.App.4th 609, defendant and three accomplices assaulted Estrada at an apartment complex where Estrada lived. During the attack, one of the assailants obtained the keys to Estrada's pickup truck. After beating Estrada, the four men left the apartment complex in defendant's car, then returned 10 or 20 minutes later. By that time, Estrada was inside his apartment. Two of the four assailants got into Estrada's truck and drove away. (*Id*. at pp. 677-678.) *Gomez* held there was substantial evidence to support defendant's conviction for carjacking.

> "The immediate presence requirement is more easily met in this case than in *Medina* or *Hoard*. Here, although Estrada was inside his apartment at the time the [suspects] took his truck, the truck was only approximately 10 feet away from him. He watched the men through his window and made eye contact with them. Under the circumstances described above, the jury could reasonably find that Estrada was fearful of a further assault and would have acted to stop the [suspects] and retain possession of his truck if not prevented by such fear. The fact that 10 or 20 minutes had elapsed between the physical assault and the taking of the keys is insignificant. Regardless of the passage of time, fear was being used against Estrada at the time the vehicle was taken." (*People v. Gomez*, *supra*, 192 Cal.App.4th at p. 624.)

Gomez distinguished the case from *Coleman*, since the keys were taken directly from Estrada during the physical assault. (*People v. Gomez*, *supra*, 192 Cal.App.4th at p. 625.)

C. <u>Analysis</u>

Defendant contends that CALCRIM No. 1650 erroneously defined carjacking to include taking a vehicle from the victim's constructive possession, and the instruction should have included taking the vehicle involving "the concept of physical control."

Defendant argues that additional language should have been given for the following reasons:

> "[T]he owner's keys were taken in another location and his car driven away. Jurors sorely needed instruction on physical control to resolve the immediate presence issue here for purposes of carjacking. Instead, these skewed and misleading instructions pointedly suggested that for carjacking (unlike robbery) it did not matter if the victim had any proximate physical control of his car." (Fn. omitted.)

Defendant further asserts that "[w]ithout the element of *physical* control in this definition, immediate presence was stretched into expansive concepts of constructive possession phrased in overly broad terms of the right to control. Mr. Mosley had the 'right to control' his car no matter where it was parked in town. The conspicuous omission of physical control from carjacking (but not robbery) meant [defendant] was guilty even if the car was parked blocks away or across down. This was unfair. Jurors needed to know the settled requirement that there has to be some element of proximate physical control (not bare right to control as might show constructive possession) to show immediate presence)." (Original italics.)

Defendant's arguments seem to challenge the statutory definition of carjacking, and convictions under that statute, since section 215 defines the offense as "the felonious taking of a motor vehicle in the possession of another, *from his or her person or immediate presence*…." (Italics added.) CALCRIM No. 1650, as given to the jury, correctly states the elements of this offense, including the definition of "immediate presence." (*People v. Gomez*, *supra*, 192 Cal.App.4th at p. 623.) A violation of section 215 does not require the vehicle to be taken from the direct physical control of the owner. As shown by *Medina*, *Hoard*, *Gomez*, and even *Coleman*, the jury in this case was properly instructed and defendant's conviction for carjacking is supported by substantial evidence. Indeed, this case is quite similar to the facts in *Hoard*. One of the robbers demanded the identity of the owner of the Dodge Charger. Mosley claimed ownership,

and he was ordered to turn over the keys at gunpoint. Mosley was already lying on the floor. He pushed the keys across the floor, and one of the suspects picked up the keys. The vehicle was parked behind the barbershop, and another robbery victim heard a vehicle driving away shortly after the two robbers left the store. The suspects abandoned the vehicle within minutes.

Defendant complains that the carjacking instruction should have included the concept of physical control, using language used in robbery instructions. Defendant seems to suggest that he only could have been convicted of carjacking if the jury had been instructed that the vehicle was taken from the direct physical control of the victim. As we have explained, however, the jury herein was properly instructed with the definition of carjacking and immediate presence, and there is overwhelming evidence to support defendant's conviction for carjacking based on demanding and then taking the car keys from the owner at gunpoint, while the vehicle was parked just behind the scene of the crime.

Defendant contends that his instructional challenge is supported by *People v. Hayes* (1990) 52 Cal.3d 577 (*Hayes*), but his reliance on *Hayes* is misplaced. In *Hayes*, the trial court's instructions on immediate presence were held erroneous because they allowed the jury to find that element satisfied so long as the victim perceived any overt act connected with the robbery's commission, such as the defendant's use of force or fear. (*Id.* at pp. 627-628.) *Hayes* found this "rendered the 'immediate presence' element devoid of all independent meaning, making it redundant with the 'force or fear' element." (*Id.* at p. 628.)

Hayes does not undermine the holdings of *Hoard*, *Medina*, and *Gomez*, that taking the victim's car keys at gunpoint and then driving off with the victim's nearby car, satisfied the immediate presence element of carjacking.

We thus conclude the jury was properly instructed and his conviction for carjacking is supported by overwhelming substantial evidence.

VIII. CALCRIM NO. 373; UNJOINED PERPETRATORS

Defendant next contends the court erroneously instructed the jury with CALCRIM No. 373, not to speculate about the absence of unjoined perpetrators. Defendant argues the instruction violated his due process rights because it prevented the jury from speculating why Ashli Winters and Terrance Ellis were not being prosecuted for their purported involvement in the barbershop robberies.

A. Background

The jury received CALCRIM No. 373 as follows:

> "The evidence shows that another person may have been involved in the commission of the crimes charged against the defendant. *There may be many reasons why someone who appears to have been involved might not be a co-defendant in this particular trial*. [¶] *You must not speculate about whether that other person has been or will be prosecuted*. Your duty is to decide whether the defendant on trial here committed the crimes charged." (Italics added.)

Defendant did not object to this instruction.

B. Analysis

Defendant contends this instruction was erroneous because it prevented the jury from "speculating" about the prosecution testimony of Terrance Ellis and Ashli Winters. Defendant asserts his constitutional rights were violated because the jury should have been permitted to consider "what effect potential future prosecution had on these witnesses.… Jurors needed to fully air out whether these witnesses' accounts were the result of serious fears of prosecution of themselves and others the defense argued were covering for." Defendant asserts that jury could have construed the instruction "to limit their discussion of why Winters or Ellis were not on trial too—and whether they would be prosecuted in the future."

First, the entirety of the record demonstrates that CALCRIM No. 373 was directed at the complete absence of Patrick Harris from this case, either as a codefendant or a witness for either side. The prosecution introduced overwhelming evidence that

defendant and Harris committed the barbershop robberies together. Indeed, Harris was initially charged with defendant in this case, but the prosecution opted to try the case against defendant only. In any event, the plain language of the instruction was directed to the absence of Harris as a codefendant in this case.

Second, CALCRIM No. 373 has been approved as a correct statement of the law. The instruction "does not tell the jury it cannot consider evidence that someone else *committed* the crime. [Citation.] It merely says the jury is not to speculate on whether someone else might or might not be *prosecuted*." (*People v. Farmer* (1989) 47 Cal.3d 888, 918-919, italics in original.)

Third, to the extent the instruction was erroneous, any error is harmless given the entirety of the instruction. In *People v. Brasure* (2008) 42 Cal.4th 1037 (*Brasure*), the trial court instructed the jury with the predecessor instruction to CALCRIM No. 373, which was CALJIC No. 2.11.5, and stated:

> " 'There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crimes for which the defendant is on trial. [¶] There may be many reasons why that person is not here on trial. *Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted*. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial.' " (*Brasure, supra*, 42 Cal.4th at p. 1055, fn. 12, italics added.)

Brasure held the trial court should not have given CALJIC No. 2.11.5 "in unmodified form" with regard to two prosecution witnesses who were accomplices or possible accomplices in that case. (*Brasure, supra*, 42 Cal.App.4th at p. 1055.) However, *Brasure* also held the instructional error was not prejudicial because the jury received a full set of instructions on witness credibility and assessing the testimony of accomplices, "including the direction to consider the existence of any 'bias, interest, or other motive' on a witness's part (CALJIC No. 2.20) and to view the testimony of an accomplice with caution (CALJIC No. 3.18). Where the jury has been so instructed, we

have repeatedly held, giving CALJIC No. 2.11.5 is not prejudicial error." (*Id*. at p. 1055.)

> " 'When the instruction is given with the full panoply of witness credibility and accomplice instructions, as it was in this case, [jurors] will understand that although the separate prosecution or nonprosecution of coparticipants, and the reasons therefor, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses.' " (*Brasure, supra,* 42 Cal.App.4th at pp. 1055-1056.)

As applied to the instant case, the pattern instruction for CALCRIM No. 373 includes the option of bracketed closing language which states: "[This instruction does not apply to the testimony of _____ <insert names of testifying coparticipants>.]" The Bench Notes to CALCRIM No. 373 state that "[i]f other alleged participants in the crime are testifying, this instruction should not be given or the bracketed portion should be given exempting the testimony of those witnesses." The Bench Notes further state that "[i]t is not error to give the first paragraph of this instruction if a reasonable juror would understand from all the instructions that evidence of criminal activity by a witness not being prosecuted in the current trial should be considered in assessing the witness's credibility." (See also *People v. Fonseca* (2003) 105 Cal.App.4th 543, 549-550.)

To the extent that the instruction may have been erroneous as to the prosecution testimony of Ellis and Winters, any error was harmless. The jury was well aware that Ellis was initially considered a suspect, Winters had been advised that she faced prosecution if she had shielded the suspects, and that Winters testified under a grant of immunity. More importantly, the jury herein was also instructed on the full range of factors to consider the credibility of witnesses pursuant to CALCRIM No. 226, including whether the witness' testimony was influenced by bias, prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case was decided; the witness' attitude about the case or about testifying; and whether the witness was promised immunity or leniency in exchange for his or her testimony. The jury also

received CALCRIM No. 318, to determine whether a witness' prior inconsistent statements were true or false. Any error in giving CALCRIM No. 373 without the bracketed language was thus harmless. (*Brasure, supra,* 42 Cal.App.4th at p. 1055.)

IX. CALCRIM NO. 376; KNOWING POSSESSION OF RECENTLY STOLEN PROPERTY

Defendant argues the court erroneously instructed the jury with CALCRIM No. 376, that the jury may consider defendant's possession of recently stolen property if there was other supporting evidence of guilt. Defendant argues the pattern instruction reduced the prosecution's burden of proof as to identity and permitted an irrationally permissive inference of guilt as to the charged offenses. Defendant did not object to this instruction.

As defendant acknowledges, this argument has been repeatedly rejected. CALCRIM No. 376, like its predecessor instruction, CALJIC No. 2.15, "is an instruction generally favorable to defendants; its purpose is to emphasize that possession of stolen property, alone, is insufficient to sustain a conviction for a theft-related crime. [Citations.] In the presence of at least some corroborating evidence, it permits–but does not require–jurors to infer from possession of stolen property guilt of a related offense such as robbery or burglary." (*Gamache, supra,* 48 Cal.4th at p. 375.) CALCRIM No. 376 is thus appropriate in cases charging robbery and/or theft. (*Gamache, supra,* 48 Cal.4th at p. 375.)

Moreover, the California Supreme Court has previously held CALJIC No. 2.15 "does not establish an unconstitutional mandatory presumption in favor of guilt [citation] or otherwise shift or lower the prosecution's burden of establishing guilt beyond a reasonable doubt [citations]." (*Gamache, supra,* 48 Cal.4th at p. 376.) On this point, the relevant language in CALCRIM No. 376 and CALJIC No. 2.15 is "linguistically synonymous" and "constitutionally indistinguishable." (*People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1036; see also *People v. Moore* (2011) 51 Cal.4th 1104, 1130-1131.) We are bound to follow and apply the California Supreme Court's holding and reject

defendant's contrary assertions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

X. PRESENTENCE CREDITS

Defendant contends, and the People concede, that he is entitled to one additional day of presentence credit, for a total of 482 days instead of 481 days. We shall order the record corrected.

DISPOSITION

The superior court is directed to correct the abstract of judgment to reflect that defendant has 482 days of presentence credits, prepare an amended abstract of judgment to reflect the correction, and transmit certified copies of the amended abstract to all appropriate parties and entities. In all other respects, the judgment is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Cornell, Acting P.J.

_____
Franson, J.